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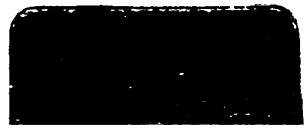

THE

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CONTAINING ALL THE

IMPORTANT BANKRUPTCY DECISIONS

IN THE

UNITED STATES.

EDITORS:

WILLIAM A. SHINN, RAPHAEL J. MOSES, JR

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THE NATIONAL

BANKRUPTCY REGISTER.

REPORTS.

VOLUME III.

A bill of expenses was presented on behalf of petitioning creditors, approved by the Register, and approved and ordered to be paid by the District Judge. Assignees refused to pay same, and petitioned the Circuit Court for review.

Held, (1.) Petitioning creditors are entitled to be reimbursed, on motion, for their reasonable expenses in proceedings against involuntary bankrupts.

(2.) They must file claim therefor, and assignees are entitled to be heard against its allowance, and may contest the items of the claim.

In re MOSES AND CHARLES MITTELDORFER.

THESE parties were adjudicated bankrupts upon the petition of Messrs. Lathrop, Ludington & Co., of New York, creditors. S. S. Rowland, attorney, purporting to act at the instance of a majority of the creditors, submitted a bill of expenses and disbursements made on their behalf. The items were as follows:

Deposit fee	$50 00
Keeper's fee in charge of store to February 1st	70 00
Marshal's fee, taking inventory	185 00
Insurance on stock goods	40 00
Expenses and services in attending trial and adjudication of bankruptcy	220 00
Attending meeting of creditors and representing majority in number and amount in electing assignees	150 00
Trial and examination of bankrupts during three weeks	490 00
Paid E. Y. Cannon, extra counsel	250 00
	$1,455 00

In re Moses and Charles Mitteldorfer.

Mr. Rowland swore before Register Bond that the said disbursements and expenses had been necessarily and actually incurred and paid by him in the said proceedings in bankruptcy.

Register Bond indorsed his opinion on the bill, that it should be paid before any general distribution of the assets; and the District Judge approved and allowed the same by order of the court.

The assignees refused to pay the said bill, whereupon the District Judge made an order, stating that it appeared to the satisfaction of the court "that the costs and disbursements incurred in the proceedings in this matter have been duly taxed before the Register in Bankruptcy, and certified to this court, and that an order allowing the same has been duly entered and served upon one of the assignees; and it further appearing by the affidavit of S. S. Rowland, that the said assignee disregards the said order, and denies the authority of the court in respect to the same," and directing the assignees in bankruptcy "forthwith, upon the service of the order, to draw their warrant or check upon the funds of said estate in their hands, for the sum of fourteen hundred and fifty-five dollars, *negotiable and payable to the order of Lathrop, Ludington & Co.*," and deliver the same to H. G. Bond, Register.

The assignees thereupon petitioned the Circuit Court, averring that the said orders were erroneous, and asking that the same may be reviewed and reversed for the reasons:

First. Because there has never been a taxation of the costs in the said cause. Such taxation was demanded by one of your petitioners in behalf of himself and his co-assignee, and it was refused by the Register, H. G. Bond, Esq.

Second. Because what is pretended to be a taxation of costs, is nothing more than the account of the said S. S. Rowland, indorsed with the written opinion of the Register in Bankruptcy, that it ought to be paid before any general distribution of the fund.

Third. Because the said account is unsupported by any vouchers.

Fourth. Because no opportunity was allowed to your petitioners to contest the items of said claim: it having been presented to the Register in Bankruptcy and irregularly indorsed by him, was ordered by the District Court to be paid, without having been referred to your petitioners for examination.

Fifth. Because the said account is upon its face extortionate and unjust, the major part of said claim being for services as counsel; that is to say, the sum of eleven hundred and ten dollars, of which *eight hundred and sixty dollars* are for the legal services rendered by the said Rowland, the remaining two hundred and fifty being for the services of E. Y. Cannon, Esq., a regular practicing attorney in the said court.

Sixth. Because the said Rowland, while he pretends to be an attorney, is in truth and in fact, as your petitioners are informed and believe, a regular employee in the house of Lathrop, Ludington & Co., at a regular annual salary. He is certainly not a regular practicing attorney in this city, and has never paid the license tax required by the State of Virginia and city of Richmond to be paid by all practicing attorneys.

Seventh. Because the services of one regular practicing attorney were quite sufficient for all the purposes of the case, and the fee said to have been paid by the said Rowland to E. Y. Cannon, Esq., was ample remuneration for the necessary legal services.

Eighth. Because the money pretended to have been paid by the said Rowland, was in truth and in fact paid by his employers, and this "bill of costs" is but another attempt upon the part of the said Rowland to secure for his employers an undue share in the proceeds of the bankrupt's effects.

Ninth. Because the said Rowland, being regularly in the employ of the said Lathrop, Ludington & Co., was required by them as their employee to do what he now pretends to charge for as counsel, and if other creditors agreed to unite with his employers in the proceeding, and requested the said Rowland to act for them, *it is the duty of such creditors to contribute their ratable proportion out of their private funds* to pay him;

they certainly have no right to require that other creditors, who neither employed Mr. Rowland nor desired his services, should be required to contribute to pay him (or his employers) anything, much less the unnecessary, extravagant, and extortionate claim for legal services said to have been rendered by him at the request of a majority of the creditors. So far as the proper charge for the services of Mr. Cannon, who was regarded as *the counsel in the case*, and other proper items in the account have been paid by Messrs. Lathrop, Ludington & Co., there, of course, will be no objection to refunding them when proper vouchers are produced by them; but it would be monstrous that one-fourteenth of the whole assets should be absorbed by this "bill of expenses," and thus to increase the dividend of Lathrop, Ludington & Co., and diminish that of every other creditor in the cause.

Chief Justice Chase.—This is a petition for a revision of the allowance by the Register in Bankruptcy, and confirmed by the District Court, allowing a certain compensation as counsel, to S. S. Rowland, for services in procuring the adjudication of the bankruptcy.

The claim of Rowland, who styles himself attorney, was presented to Register Bond, purporting to be an account of expenses and disbursements in behalf, and at the instance of, a majority of the creditors. It amounted to one thousand four hundred and fifty-five dollars, including a counsel fee of two hundred and fifty dollars, paid to E. Y. Cannon, Esq. The account was sworn to by Rowland, and received the indorsement of the Register, to the effect that he should be paid before any general distribution of the funds, and was afterwards, on the 5th of May, allowed by the District Court. Afterwards, on the 28th of October, 1868, the District Court made an order, reciting, among other things, that it appeared to the satisfaction of the court that the costs and disbursements incurred in the proceedings had been duly *taxed* before the Register in Bankruptcy, and certified to this court, and that the order allowing the same had been duly entered,

and served upon *one* of the assignees; and that it further appeared, by the affidavit of S. S. Rowland, that the assignee disregarded the order, and denied the authority of the court in respect to it; and thereupon, the court ordered the assignee forthwith to pay the sum, by warrant or check upon the funds of the estate for the sum of one thousand four hundred and fifty-five dollars, negotiable and payable to the order of Lathrop, Ludington & Co., and deliver the same to Register Bond, if sufficient funds belonging to the estate of the bankrupts were in the hands of the assignee.

The petitioners claim that the orders were erroneous, and ask that they be reversed. They insist that there has been no taxation of costs in this case; that what has been called a taxation of the costs is nothing but the account of Rowland, with the opinion of Register Bond indorsed upon it that it should be paid before any general distribution of the funds; that the account is unsupported by any vouchers; and that it had not been sent to them for their examination and report; and that no opportunity to contest the items of the claim had been afforded to the petitioners; that the account is, in itself, exorbitant and unjust; a great part of the claim, that is to say eleven hundred and ten dollars, being for services as counsel; of which, eight hundred and sixty dollars are for legal services rendered by Rowland, the remaining two hundred and fifty dollars for the services of E. Y. Cannon, Esq., attorney, Richmond; that Rowland was not an attorney, but an employee of Lathrop, Ludington & Co., at a regular annual salary; that the money pretended to be paid by Rowland was in fact paid by his employers; and that the bill of costs is but an attempt on their part to secure an undue share in the proceeds of the bankrupt's effects.

There can be no doubt, where one or more creditors petition for and procure an adjudication of bankruptcy against a debtor, they may, on motion, be reimbursed for their *reasonable* expenses. The fund is the fruit of the diligence of such creditors, and it would be manifestly unjust to compel them to bear alone the expenses incurred for the benefit of all. Such was

the opinion of Judge Benedict in the matter of *Julius Schwab*, an involuntary bankrupt, as reported in 2 N. B. R., 488. In his opinion the judge cites the opinion of other District Judges to the same effect.

It is clear, therefore, that all reasonable expenses incurred by Lathrop, Ludington & Co., as the petitioning creditors in this case, should be allowed to them; and it will be proper, when their claim is made and admitted, that an order should be made to this effect by the District Judge.

The assignees, however, complain that the allowance made is excessive, and, I am inclined to think, with reason; certainly an opportunity must be afforded them to contest the items of the claim.

I shall, therefore, reverse the orders made in the District Court, and the case will be referred back to that court, with instructions to allow the petitioning creditors to file a claim for the expenses incurred by them, and to allow such sum as shall appear just and reasonable in the circumstances, having due regard to the interests of the other creditors.

In re Williams, 2 N. B. R., 28 *quarto*, 83 *octavo*, per Judge Bryan. *In re* Waite, 2 N. B. R., 146 *quarto*, 452 *octavo*, per Judge Lowell.

Col. August and *M. Rutherglen*, for petitioners.

Messrs. Chandler & Bond, for respondent.*

* Petitioning creditor is allowed counsel fees. *In re* Williams, 2 N. B. R., 28 *quarto*, 83 *octavo*. The allowance, however, must be carefully considered. *In re* N. Y. Mail Steamship Co., 3 N. B. R., 155 *quarto post*; *In re* Treplett *v.* Hanlon, 1 Dillon, 217; Bump on Bank., 6th ed., 219, 489.

The allowance of costs to the petitioning creditor is based upon the principle that his services have been rendered for the benefit of all. Waite *v.* Crocker, 2 N. B. R., 146 *quarto*, 452 *octavo*; *In re* Schwab, 2 N. B. R. 155 *quarto*, 488 *octavo*. Only fees for two counsel can be allowed in same case. The application for the allowance must be to the court by petition; the Register cannot entertain the application. *In re* Dibblee *et al.*, 3 N. B. R. 185 *quarto*, *octavo*. The costs recoverable by the petitioning creditor are those allowed a party recovering in a suit in equity. 10 U. S. Stat., 151. Act of February 26, 1873. Daniel *v.* Sheehan, 8 N. B. R., 353. A retainer paid by petitioning creditor to counsel cannot be allowed, nor for services rendered after the adjudication. *In re* Comstock, 9 N. B. R., 88.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

In the examination of a witness the Register has no power to decide on the materiality or relevancy of questions. *In re* S. M. & M. Levy, 1 N. B. R., 105.

In re ADDISON F. BOND.

I, THE undersigned, one of the Registers of this court, do hereby certify that while taking testimony in the above entitled case, a question was asked by the assignee which was objected to by counsel for the bankrupt as immaterial, and not pertinent to any issue that could arise in the proceedings. When about to pass upon the admissibility of the question, the assignee objected that it was not competent for the Register to pass upon the materiality of questions, insisting that the same rule that prevails in taking testimony before an examiner in chancery, should prevail in bankruptcy, and desired that the point so raised by him should be certified to the court.

Under the requirements of Rule 19 of this court, the Register respectfully submits that the view entertained by him, that it was his duty to pass upon the relevancy of testimony offered and objected to, rests upon the idea that the Register, in every instance, when he is required to act at all, acts (within the purview of his powers) as *the Court*, and not as *an officer* of the court. This is never so in the case of an examiner in chancery. He acts strictly as an officer of the court. But when the Register is specifically charged with a duty, such duty, when performed (as by law required), is always the *act of the court*. The cases, therefore, did not seem to be parallel. Again, to devolve upon the judge the duty of reading immaterial testimony would be to increase the too arduous duties already devolved upon him. And it has seemed to me to be less laborious to occasionally send a case back to a Register, with directions to allow questions ruled out by him, than to undertake the perusal of testimony as voluminous as it often might be. Again, this court was understood, in a case which I believe is reported, the title of which I cannot now recall, to favor the opinion above expressed.

Experience has, however, shown that there is another side to the question. The labor that would be required of the Register to pass carefully and conscientiously upon every objection that is raised by counsel during the taking of testimony, would often be beyond the capacity of any one man. It is often the case that several parties are taking testimony at the same time. He must keep the run of each case, or he cannot possibly pass intelligently upon the objections as they arise.

It is respectfully submitted to this Honorable Court that the course pursued by the court in equity cases, has been found practically convenient, and that the same practice should prevail in bankruptcy. (Case Gattleson, 1 N. B. R., 170 *quarto*, 604 *octavo*.) Respectfully submitted,

I. T. Williams, *Register*.

Blatchford, J.—I have heretofore, in the case of *Samuel M. Levy and Mark Levy* (1 N. B. R., 105 *octavo*,) decided the question here raised. The view I took has been concurred in by Judge Field in New Jersey, and by Judge Hall, in the Northern District of New York. (1 N. B. R., 153 *quarto*, 549 *octavo*, *Re* Koch.) General Orders No. 10 is very explicit as to what the Register is to do.

The Clerk will certify this decision to Isaiah T. Williams, Esq.*

UNITED STATES DISTRICT COURT—NORTH CAROLINA.

Wife of bankrupt not entitled to claim dower out of lands owned by bankrupt when he filed his petition in bankruptcy—the bankrupt being still alive.

In re Julia A. Kelly *v.* French Strange, *Assignee*.

Brooks, J.—This is a petition filed in this cause by Julia A.

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* *In re* Reakert, 7 N. B. R., 329; *in re* Levy *et al.*, N. B. R., Sup., xxx. *quarto;* 1 N. B. R., 136 *octavo*. *In re* Rosenfeld, 1 N. B. R., 60 *quarto*, 319 *octavo*. *In re* Lyon, Sup. 1 N. B. R., xxiv. *quarto*, 111 *octavo*.

Kelly, wife of George H. Kelly, the bankrupt, in which she alleges that her said husband was, on the 30th of May, 1868, the owner of certain real estate situated in Lumberton, Robeson county, North Carolina. That on the day mentioned her said husband filed his petition in bankruptcy, upon which he was subsequently adjudged a bankrupt.

That French Strange, who was appointed assignee of the estate of her husband, sold the said real estate on the 28th day of October, 1868; that in making the sale, no interest in the lands was excepted or reserved to her; she further alleges that she filed her petition before the Clerk of the Superior Court for Robeson county, praying that her *thirds* in the lands might be laid off to her under the provisions of the Act of the General Assembly of North Carolina, of February, 1867, entitled "An Act restoring to married women their common law rights of dower."

She further alleges that at the said sale by the assignee it was publicly announced that she claimed her dower interest in the said lands. The petitioner concludes by praying this court to make an order that French Strange, assignee of George H. Kelly, pay to the petitioner one-third of the proceeds of said sale, in lieu of her dower interest in the same.

It is not stated that the assignee sold the real estate mentioned by order of the court, as assignees may be ordered to do when lands or other property is encumbered by lien, mortgage, or the title to which may be in dispute. The court takes it for granted, therefore, that the assignee sold the land mentioned without such special order, and if so, the assignee sold only such right to the land as was vested in him by the proceedings in bankruptcy.

This, then, was a sale subject to all liens or lawful encumbrances existing at the time the proceedings in 8
bankruptcy were commenced, and I might properly decline the order the petitioner asks in this case, without determining whether the petitioner is entitled to any interest in the lands sold or not. Inasmuch, however, as it may save answering the question slightly altered from the present, I will here

state my opinion as to the effect of the Act of the General Assembly of February, 1867, before referred to.

The right of a widow to dower is well understood and defined by the common law.

The common law prevailed in North Carolina until our Act of Assembly, which restricted the widow's right to dower to such lands only as her husband *died seized and possessed of*. It is a well-known principle of law, that if the common law be altered by the enactment of a statute, the repeal of such statute restores or revives the common law. It follows then that if our Legislature had, instead of the act passed in February, 1867, simply in words repealed the then existing statutory provisions in regard to dower, the common law in regard to dower would have been *eo instanti* in force in North Carolina, and entitled every widow whose husband died after such repeal, to dower in all the lands of which he was seized during coverture, and which had not been lawfully conveyed before such repeal.

And the question now to be answered is whether the Act of February, 1867, did more than merely repeal the then existing statute.

It is quite clear that the Legislature designed to do more, for that body not only repealed the statute, but in express words restored the common law; and not content with thus doubly restoring the common law, it enacts that a *wife's dower* must be laid off and distinguished from the other lands of her husband, before any sale can be made by a sheriff or other officer under execution—*and this, too, in the lifetime of her husband.*

This was but an effort to create a new and additional exemption of property of the debtor from the execution of his creditor, and to this extent is unconstitutional and void, as to debts existing at the time of the passage of that act. As to existing debts, that section of the act which relates to the *wife's dower* is not more effectual than if it had been misnamed, but had been entitled An Act to exempt certain property to a wife from execution against her husband, etc.

By the act passed by the Legislature in 1868, I do not see that it is made more favorable to the petitioner, for, like the act of 1867, its leading purpose is to exempt in the lifetime of the debtor, in behalf of his wife, one-third of his lands from the execution of a creditor whose debt was contracted before the passage of the act, and to that extent is unconstitutional and void.

The order asked for by the petitioner is therefore refused. It is not necessary that I should express my opinion as to the rights of the petitioner in the event she should survive her husband, further than to refer to the opinion of this court *in re* Jesse H. Smith, certified from the Seventh District.

Let this be certified to William A. Guthrie, register.

Wm. S. Norment and *N. A. McLean*, attorneys for Julia A. Kelly.

James C. McRae, attorney for French Strange, assignee.*

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

When application is made by a bankrupt for his discharge, after the expiration of a year from the adjudication of bankruptcy, it is discretionary with the court to grant or withhold the discharge according to the circumstances of such case. The discharge after the year not to be granted as a matter of course; but the bankrupt may be permitted, by affidavit, petition, or otherwise, to explain in writing the causes of the delay.

In re Benjamin F. Canaday.

Drummond, J.—In this case the clerk has submitted to me an application by the bankrupt for his discharge.

* *Thompson* v. *Moses*, 43 Ga. Rep., 383. *Ex parte* Bell, 1 Glyn & J., 232. *Eberle* v. *Fisher*, 13 Penn., S. & 1 H., 526; *Helfrech* v. *Obemyer*, 15 Penn., S. & 3 H., 113; *Directors of the Poor* v. *Rogers*, 43 Penn., S. & H., 7 Wr. R., 153; *Woodward* v. *Clarke*, 2 Grant Cases, 87; *Worcester* v. *Clark*, 2 Grant, 84.

The only objection to the granting of the discharge arises from the fact that the adjudication of bankruptcy was made by the court on the 5th of December, 1867, and the application was not presented by the bankrupt till after the 5th of December, 1868.

The question is, Has the court power to grant the discharge?

The 29th section of the Bankrupt Law declares, That at any time after the expiration of six months from the adjudication of bankruptcy * * * and *within one year* from the adjudication of bankruptcy, the bankrupt *may* apply to the court for his discharge from his debts."

It may be thought the implication here is that no discharge can be granted unless application be made within the year, but I am inclined to think that would be rather a narrow construction of the language. The intention obviously was to promote diligence; but there is nothing which in terms forbids the discharge, if the application is made after the year. The words, it will be observed, are permissive. "The bankrupt *may* apply for his discharge"—not that he *must* or *shall*, within one year, so apply.

It will sometimes happen, from various causes, and without any fault of the bankrupt, that the application may be delayed, and in such case it would be hard to withhold the discharge. It seems to me more in accordance with the general scope and meaning of the law to construe this clause of the 29th section, as giving a discretion to the court to grant or withhold the discharge, according to the circumstances of each case, when application is made after the expiration of the year. If, in a given case, the delay was the result of gross negligence on the part of the bankrupt, the court might well refuse the application. I think, therefore, that the true rule in the case under consideration is, not to grant the discharge as of course, but to permit the bankrupt, by affidavit, petition, or otherwise, to explain in writing the causes of the delay; and that will be the practice adopted in the present case; and if the explanation shall prove satisfactory, the usual notice will be given to the

creditors to appear and show cause why a discharge should not be granted to the bankrupt.*

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

Where it clearly appears that a trade formerly carried on by the bankrupt had been ended before the bankruptcy, and that nothing concerning that trade remained outstanding, so that there was nothing for the assignee in bankruptcy to inquire into or to do concerning the same, the failure of the bankrupt to keep proper books of account for that trade will not bar his discharge.

In re WILLIAM KEACH.

LOWELL, J.—The charges of fraud against this bankrupt have been fully examined, and it is frankly admitted by the opposing creditor that the evidence would not warrant me to find him guilty of any of them, and with this conclusion I entirely agree.

The only question open for judgment is, whether he has failed to keep proper books of account, within the meaning of the act.

It seems that the bankrupt, during the winter of 1867–8, carried on for a few months a cash business at the town of his residence, in buying wood by the car-load, and sawing and

* This case refers to two classes of cases only:

1st. Where no assets have come to the hands of the assignee.

2d. Where no debts have been proved.

See *In re* Woolums, 1 N. B. R., 131 *quarto*, 496 *octavo*.

" Wilmot, 2 N. B. R., 76 *quarto*, 214 *octavo*.

" Bodenheim *et al.*, 2 N. B. R., 133 *quarto*, 419 *octavo*.

" Martin, 2 N. B. R., 109 *quarto*, 548 *octavo*.

But if the discharge is refused on this ground he may file a new petition in bankruptcy, and his previous failure will not prejudice his rights. *In re* Farrell, 5 N. B. R., 125.

Where debts have been proved and assets come to the hands of the assignee, the year's limitation does not apply. *In re* Green, 2 N. B. R., 98–100 *quarto*, 298–311 *octavo*.

splitting it for sale to his neighbors for fire-wood. He says he had no occasion for any books, and kept none. He gave up the business some considerable time before he applied for the benefit of the act, and it is stated, and not denied, that there was nothing left outstanding either in the way of assets or of debtors or creditors that could in fact affect the proceedings here. While I cannot doubt that the bankrupt was a tradesman so long as he carried on that business, yet I am of opinion that the strict and somewhat harsh rule of the Bankrupt Law concerning the keeping of books, ought not to be extended to his case.

The purpose of the act is to give to the assignee and the creditors full and authentic information of the state of the bankrupt's business; and it being presumed by Congress that merchants and tradesmen ought to be able to keep books of account, it requires them to do so if they would avail themselves of the advantages of this law. But if the business has been wholly closed, so that no rights or interests can be subject to examination or decision in the Bankrupt Court, and neither debtors nor creditors remain, and the business was one which neither required nor received the use of any capital, so that there is nothing in it which can concern the assignee, or which the books could show him to his advantage, it seems to me that such past trading is not within the equity of the statute, and it is, perhaps, not within the letter, because it may well enough be said that he is not a merchant or tradesman at any time to which the law relates.

It may be contended that the books themselves are the only proper evidence that the business is thus wholly closed and past. There would be great force in this suggestion as applied to any facts which could be shown to be of interest to the assignee; but the mere negative, that there is nothing in the books which concern him, and would have been nothing, however well they might have been kept, may be proved *aliunde*. The schedules and proofs of debts, and all the proceedings in the case, tend to show that fact, and may be admitted for that purpose, together with the oral testimony.

That the trading has ceased or been suspended, is not material; but when nothing remains of it to be disposed of, it is hardly right to consider the bankrupt to be a merchant or tradesman within the statute, any more than if he never had been such. His trading and his neglect to keep books are alike immaterial to his present creditors and their representative, the assignee.

I have been obliged, by my view of my duty, to refuse a discharge to some merchants and tradesmen who seemed to me not to have complied with the law. I have done so reluctantly, where no intentional fraud was shown; and I am happy to learn that measures have been taken to review these decisions. I shall be glad if the Circuit Court can construe the law more liberally for honest traders than I have been able to do, or if a different state of facts can be shown in any case. In this case I am not sorry to be able to say that I do not find this bankrupt to be a merchant or tradesman within the fair construction of the Act of Congress.

L. Mason, for the opposing creditors.

J. B. Goodrich, for the bankrupt.*

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* *In re* Rosenfield, 1 N. B. R., 161 *quarto*, 575 *octavo*.
" O'Bannon, 2 N. B. R., 26 *quarto*, 15 *octavo*.
" Solomon, 2 N. B. R., 94 *quarto*, 285 *octavo*.
" Newman, 2 N. B. R., 99 *quarto*, 302 *octavo*.
" Gay, 2 N. B. R., 114 *quarto*, 358 *octavo*.
" White, 2 N. B. R., 179 *quarto*, 590 *octavo*.
" Littlefield, 3 N. B. R., 13 *quarto*, *octavo*.
Hammond *v.* Coolidge, 3 N. B. R., 71 *quarto*, — *octavo*.
In re Belis, 3 N. B. R., 124 *quarto*, *octavo*.
" Bound, 4 N. B. R., 164 *quarto*, *octavo*.
Edward Garrison, 7 N. B. R., 287; *in re* Schumpert, 8 N. B. R., 415.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

Where there was no opposition to the discharge of an involuntary bankrupt, the question of competency to grant a discharge in such case, was certified for decision by the court.

Held, that in a proper case an involuntary bankrupt might be granted a discharge.

In re SAMUEL D. CLARK.

DRUMMOND, J.—In this case the Register of the first district has certified to the court that there is no opposition to
4 the discharge of the bankrupt by any creditor, and that he is entitled to his discharge, provided it is competent in law to discharge an involuntary bankrupt.

I understand also that doubt has been expressed on this point in other quarters, and I have therefore examined the question. It is rather singular that the Bankrupt Law nowhere refers in express words to the discharge of an involuntary bankrupt, but I think that the necessary conclusion from the whole law is, that the fact of the applicant being an involuntary bankrupt, should not of itself alone prevent his discharge.

The 42d Section declares, that "the warrant shall be directed and the property of the debtor shall be taken thereon, and shall be *assigned and distributed in the same manner and with similar proceedings* to those hereinbefore provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition." The object in both cases—voluntary and involuntary—is the same—the distribution of the assets of the bankrupt among his creditors, in conformity with the modes pointed out by the law.

Undoubtedly, if the act of bankruptcy alleged and proved against the involuntary bankrupt, comes within any of the alternatives specified in the 29th Section, which prevent or render invalid any discharge, he should not be discharged; but if there be nothing of that kind set forth in the petition by the creditor, I see no good reason why the party should be compelled to go through the vain ceremony of filing a petition himself, to be released from his debts, when his debts and

assets have just been administered by the Bankrupt Court at the instance of a creditor. For example, under the 39th Section, if a debtor shall conceal himself to avoid the service of legal process in an action for the recovery of a debt or demand provable under the act, that would constitute an act of bankruptcy, and authorize proceedings by a creditor against him, but unless that concealment were a fraud, it would not prevent his discharge under the 29th Section; and so of some other acts of bankruptcy mentioned in the 39th Section. Upon principle, if the involuntary bankrupt has acted in good faith, there is no good reason why he should not be released from the payment of his debts upon the surrender of all his property to the assignee, as well as the volunteer; and though the language of the act touching discharges, applies generally, if not always, to those who have filed their own petition, yet I think the necessary implication is, that if the 29th Section do not prevent it, the involuntary bankrupt is entitled to his discharge.

It seems to me, if Congress had intended to exclude all involuntary cases, without distinction, from the relief of a discharge, it would have been clearly expressed.

But there are two words used in a parenthesis in the form of discharge given in the 32d Section, which, though it is merely in a form, and the law declares that the form of certificate may be that *in substance*, yet it would seem to indicate that the discharge might be as well of the involuntary as voluntary bankrupt. "On which day the petition for adjudication was filed by (*or against*) him."

There is also possibly an inference to be drawn from the language used in the beginning of the 30th Section in favor of the opinion already intimated by the words "on his own application;" and a similar inference may be drawn from parts of the 36th and 37th Sections.

On the whole, therefore, I can have no doubt that in a proper case an involuntary bankrupt may be discharged.*

* *In re* Bunster, 5 N. B. R., 89.

UNITED STATES DISTRICT COURT—DISTRICT OF OREGON.

When a petition is filed against a person, praying that he may be adjudged a bankrupt, it should state the facts clearly, and when it does not the respondent may decline to answer it.

If a man's debts cannot be made in full out of his property by levy and sale on execution, he is insolvent within the primary and ordinary meaning of the word, and particularly in the sense in which the word is used in the Bankrupt Act.

Held, under the Bankrupt Act, that an assignment, whether the assignor be solvent or insolvent, with intent to delay, hinder, or defraud, is an act of bankruptcy.

In re RANDALL & SUNDERLAND, *Involuntary Bankrupts.*

DEADY, J.—On January 30, 1869, a petition was filed in this court by Einshein Brothers & Co., of San Francisco, against the firm of Randall & Sunderland, of this city, praying that said firm might be adjudged bankrupt, for the causes therein specified.

An order to show cause was issued, and made returnable February 13; at the same time an injunction was allowed against R. & S., and their assignee, John R. Foster, restraining them from interfering with or disposing of the goods, etc., of the firm.

On the return day of the order to show cause, R. & S. appeared by counsel and filed an answer to the petition. At the same time, by consent of counsel, the case was set down for hearing by the court at a future day. On February 20 the court heard the testimony in the case and the argument of counsel, and took the matter under consideration.

The petition alleged the commission of three distinct acts of bankruptcy by R. & S.

First. That R. & S., within six calendar months next preceding the date of the petition—in January, 1869—did make an assignment, sale, and transfer of all their stock in trade, store fixtures, and accounts, the same being all the property of R. & S., to one John Foster, with intent to delay, or hinder, or defraud the creditors of them, the said R. & S.

Second. That R. & S. within the period aforesaid, in contem-

plation of insolvency, did voluntarily assign, transfer, and convey all of their property, consisting as aforesaid, to one John R. Foster—the said Foster having reasonable cause then and there to believe that R. & S. were acting in contemplation of insolvency; and that said assignment, etc., was made with intent to prevent their property from coming to their assignee in bankruptcy, and to prevent the same from being distributed under the Bankrupt Act, and to defeat the object and evade the provisions thereof.

Third. That R. & S., within the period aforesaid, being merchants and traders at Portland on Willamette, in the district aforesaid, fraudulently stopped payment of their commercial paper, within the period of fourteen days.

The answer of R. &. S. tacitly admits the existence of the debt of the petitioning creditors, six thousand one hundred and eighty-three dollars and fifty-six cents, and that it is provable in bankruptcy; and that they assigned all their property to Foster; but denies that such assignment was made in contemplation of insolvency, or with the fraudulent or illegal intents alleged in the petition, or either of them. The answer also denies that R. & S. stopped payment of their commercial paper, or that they were insolvent or contemplated insolvency.

On the trial, Sunderland and Foster were examined as witnesses, but Randall was not. No evidence was offered touching the third alleged act of bankruptcy.

Section 41 of the act, which provides for "a trial," "to ascertain the fact of such alleged bankruptcy," declares that if upon such trial "the debtor proves to the satisfaction of the court * * * that the facts set forth in the petition are not true * * * the proceedings shall be dismissed and the respondent shall recover costs."

The effect of this provision is to throw the burden of proof upon the respondents, and a denial of the facts in the petition, by the answer of the respondents, does not shift this burden upon the petitioners. No other or less effect can be given to the language of Section 41, requiring the debtor to prove

that the facts set forth in the petition are not true. But it seems to me, on the other hand, that justice to the debtor requires that the facts to be disproved by him should be stated with such certainty and detail as to inform him of what he is to make an explanation or proof.

A general statement in a petition, that a debtor, in January, 1869, stopped payment of his commercial paper for the period of fourteen days, is not, in my judgment, such an allegation of fact as will warrant an adjudication of bankruptcy against the debtor unless he disproves or explains it. In answer to this it may be said that the allegation concerning the commercial paper is in the language of Form 54. But it should be remembered that the various statements of acts of bankruptcy, given in Form 54, are mere outlines or skeleton statements, to be filled in with the particular circumstances of the case in question, and such is the direction given in the *nota bene* near the end of the form.

This allegation should state as nearly as possible the date of the promissory note or bill of exchange of which payment had been stopped; to whom made and for what amount, and when payable; and whether the debtor was liable thereon as maker or indorser; and by whom the same was held when payment was neglected or refused.

Again, it may be said that if the allegation was not sufficiently distinct the respondent should have declined to answer it, on that ground, and asked that it be made more definite and certain, or stricken out. This, I suppose, would be the better practice, particularly when there is an attempt to state a particular stoppage or suspension of payment, and the same is stated defectively or insufficiently. But when the allegation is a general one—that the debtor stopped payment of his commercial paper—without containing any particular fact or facts pointing to any particular paper, in my opinion, as to this, there are no "facts set forth in the petition" which the debtor is required to prove not true, to prevent being adjudged a bankrupt thereon.

Before proceeding to consider the second act of bankruptcy

set forth in the petition, it will be necessary to state the evidence or the facts established by it, which is done as follows:

First. That from August, 1868, to January 9, 1869, R. and S. were engaged as partners in the retail boot and shoe business, on the corner of First and Alder streets, as the successors of Holmes & Sunderland. That on the morning of January 9th aforesaid, Randall was found guilty by a jury, in the United States Court for the district, of a crime punishable by at least ten years' imprisonment at hard labor, and that thereafter, on the same day, R. & S., by their writing under seal, assigned, sold, and transferred their entire property, consisting of stock in trade, store fixtures, and accounts, to John R. Foster, "For the benefit of all the creditors of said firm without distinction," and after the payment of said firm, creditors, to be applied to the payment; "of the individual debts of R. and S., according to their respective interests; that is to say, after the payment of the firm debts, the balance of the said property or the proceeds thereof, belongs to the said co-partners in equal shares, and shall be so applied." The writing then authorizes and directs the assignee; "to collect the said accounts and to manage said business, to sell and dispose of said goods according to his best discretion and judgment for the purposes aforesaid."

Second. That the assignee executed the writing, and accepted the trust, and took possession of the store and goods, and carried on the business in the usual way—Sunderland remaining in the store until the injunction was served upon him. The assignment did not state the names of any of the creditors of the firm, nor the amount separately, or in the aggregate, of their claims, neither did it state the names of the individual creditors of the partners, nor the amount of their individual indebtedness. Sunderland testified that he owed no individual debts. Foster, when being examined by the petitioner's counsel, testified that Randall told him that if he got what he was entitled to from the Post-Office Department, he thought it would pay his individual debts. An inventory of the goods, store fixtures, and accounts is annexed to the assignment. The former were inventoried at their cost in San Fran-

cisco, with the freight to Portland added, and foot up fourteen thousand two hundred and thirteen dollars and seventy cents. The store fixtures are lumped in, without any items, at five hundred dollars. The sum of one hundred and fifty-six dollars and fifty cents is charged, for premiums paid for insurance upon the goods. Sum total of value of goods, fixtures, and insurance, fourteen thousand eight hundred and seventy dollars and twenty-one cents. In addition to these the inventory contains a list of accounts due the firm from about one hundred and ninety different persons, the nominal value of which amounts to two thousand two hundred and fifty dollars and eighty cents. Of these accounts what amounts to one hundred and four dollars and twenty-five cents are marked in the inventory as "doubtful."

The petition charges that R. & S. are indebted to merchants in San Francisco in the sum of about twelve thousand dollars. Mr. Foster testifies that at the date of the assignment the indebtedness of the firm amounted to thirteen thousand dollars. The stock of goods on hand at date of assignment was a reasonably good one. There were but few full packages, most of them had been retailed from, and some sizes and kinds were lacking. The bulk of them were bought in, August or September 1868.

Mr. Foster testifies that if the goods were put upon the market and sold at once for cash, they would bring thirty cents on the dollar of the inventoried price, but that if he was allowed to carry on the business by keeping up the stock, he could work them off so as to receive one hundred cents on the dollar, and something more. Sunderland testifies as to the cause of the assignment, that when Randall was found guilty and about to be imprisoned, that he thought he would protect his creditors by taking in a responsible party, and making an assignment to him.

He also testified that on January 9th the goods were worth what they were inventoried at, and that they were sufficient to pay the debts of R. & S., but that if forced to sale for cash they would not bring fifty cents on the dollar of the inventoried

price; that he did not know what the store fixtures were worth; and that as a general thing the accounts were a good lot, and worth seventy-five cents on the dollar.

Homer Sanborn, a merchant, testifies that he assisted to inventory the goods, and that it is owing to circumstances whether they are worth the inventory price or not. Thought they were worth that to R. & S. Under the circumstances he would have been willing to take the goods and business and pay the debts of the firm; that he and Jno. R. Foster were indorsers for R. & S. for one thousand dollars.

Upon this state of facts, the first question that arises in the consideration of the second alleged act of bankruptcy, is the solvency of the firm of R. & S. at the time of this assignment. A solvent man is one who is able to pay all his debts in full, at once or as they become due. Insolvency is merely the opposite of solvency. A man who is unable to pay his debts out of his own means, or whose debts cannot be collected out of such means by legal process, is insolvent—and this is so, although it may be morally certain, that with indulgence from his creditors, in point of time, he may be ultimately able to satisfy his engagements in full.

The term insolvency imports a present inability to pay. The probable or improbable future condition of the party, in this respect, does not affect the question. If a man's debts cannot be made in full out of his property by levy and sale on execution, he is insolvent within the primary and ordinary meaning of the word, and particularly in the sense in which the word is used in the Bankrupt Act.*

Tried by this rule, I have no doubt but R. & S. were insolvent at the date of this assignment. The nominal value of their assets, as set forth in the inventory, including goods, fixtures, accounts, and insurance, is seventeen thousand one hundred and twenty-seven dollars and one cent, and their debts, as testified by Mr. Foster, amount to thirteen thousand dollars. It

* Burrill on Assignments, 38, 41; 4 Hill, 652; 13 How., 167. *Bank Hastings* v. *Truax*, 1 N. B. R., 146 *quarto*, 545 *octavo*. *Foster, assignee, Blake* v. *Hackley*, 2 N. B. R., 131 *quarto*, 406 *octavo*.

is not probable that seventy-five cents on the dollar could be realized from this property upon legal process, and even this result would scarcely produce enough to pay the debts, not counting the expenses of sale, etc. It is more likely it would not fetch over fifty cents on the dollar.

The goods had been culled over at retail. The fixtures are not itemized in the inventory, and they probably have little if any value out of the store-room and business in which they are used. The accounts, even if all of them were against solvent people, would scarcely pay twenty-five cents on the dollar after deducting the expenses of collection by legal process, and it is safe to conclude that they would not sell in open market for fifty cents on the dollar.

The parties being insolvent at the making of this assignment, did they make it with the intention to defeat or delay the operation of the Bankrupt Act? Every person is presumed to intend the natural and probable consequences of his own acts. This assignment attempts to vest the whole of the property of R. & S. in a trustee selected by them, for the purpose of equal distribution among all their creditors. If allowed to stand, one of the necessary consequences will be that the property of these insolvents will be prevented from coming to the assignee in bankruptcy, and from being distributed among the creditors under the Bankrupt Act, and so the operation of the act will be defeated.

This natural and not only probable, but necessary consequence of this assignment, the assignors must be presumed to have intended, unless they show to the contrary. As to this, the burden of proof is upon them.

The necessity of the provision in the act which makes void an assignment by an insolvent, without intent to delay or defeat the act (Section 35), and also the provision which declares such an assignment an act of bankruptcy (Section 39), is apparent. Without them the law could and would be successfully evaded to the injury of creditors. In addition, the justice and propriety of the act in this respect cannot be questioned. In good morals the property of an in-

solvent debtor belongs to his creditors. They being the primary and real parties in interest, are entitled to give direction in the settlement and distribution of the insolvent's estate, and to select the person to contract and dispose of it for the common benefit.

To secure this result is the purpose of the Bankrupt Act. The necessary consequence of this assignment, if allowed to stand, is to defeat this purpose in this case, and therefore the law declares the making of it an act of bankruptcy. It would seem that, in effect, the law forbids any assignment by an insolvent or person in contemplation of insolvency for any purpose.

True, an assignment made with the consent, and accepted by all the creditors of the assignor, might be upheld, not because such assignments are expressly permitted by the law, but because the creditors would be bound by their acceptance, and estopped from impugning the legality of an act which had been done with their consent and approval.

My conclusion is, then, that the facts set forth in the petition as to the second act of bankruptcy are true. That the respondents, being insolvent, made this assignment with intent to defeat the operation of the Bankrupt Act, by preventing their property from coming to their assignee in bankruptcy, and to prevent the same from being distributed under the Bankrupt Act. This is a necessary consequence of the assignment, if allowed to stand, and no other purpose or object is shown or suggested for making it.

A single act of bankruptcy being proven, it is not necessary to consider the first charge in the petition—that R. & S. made this assignment with intent to delay, or hinder, or defraud creditors.

If, however, the respondents were solvent at the date of this assignment, as claimed by them, then in contemplation of law the assignment would have been to delay, hinder, and defraud creditors; because, if allowed to stand, such would have been its operation and effect. An assignment by a solvent person for the benefit of creditors, with or without preferences, is

void under the statute of frauds, because the necessary consequence of it is to delay and defraud creditors by preventing them from subjecting their debtors' property by the ordinary legal proceedings and process, to the satisfaction of their claims.*

Section 30 of the act makes an assignment, whether the assignor be solvent or insolvent, with intent to delay, hinder, or defraud creditors, an act of bankruptcy. Upon the face of this assignment, the firm of R. & S. profess to be solvent, because they expressly provide for the disposition of the *surplus* of their property after paying their debts.

Again, an assignment which authorizes the trustee or assignee to sell on credit, or in any manner to prolong his possession of the property beyond the time reasonably necessary to convert it into cash and distribute it among the creditors, is void under the statute of frauds, and also an act of bankruptcy, because its necessary consequence is to delay and hinder creditors.

This assignment leaves this matter to the judgment and discretion of the assignee, and even authorizes him to "manage the business" according to such judgment and discretion. The business of R. & S. was the retail trade in boots and shoes. If the assignee is "to manage" this as he thinks best, he may think best to carry it on for years, and continue to invest the proceeds of sale in new stock, instead of disposing of the stock and distributing the proceeds among the creditors at once.

Indeed, I infer from the testimony of Mr. Foster, that he had some such purpose in view. From the proceeds of the sales of the property, he had already purchased some new stock. He spoke of what he expected to realize for the stock on hand by disposing of it in the course of business. This process might occupy several years. In the meantime, the assignee might prosper and make money for all concerned, or he might by misconduct or misfortune lose all that had been assigned to him, and leave the creditors without anything. In the meantime,

* 15 Barb., 56; American Law Reg., Vol. VII., 431; Burrill on Assignments, 38.

and however the operation might result, the creditors would be delayed and hindered in the collection of their debts.

Judgment must be given declaring the respondents bankrupts upon the ground of the assignment of their property while insolvent, with the intent to defeat the operation of the Bankrupt Act.

Friedenrich & Stout, for petitioners.

Logan & Dolph, for respondents.

UNITED STATES DISTRICT COURT.—N. D. NEW YORK.

Firm dissolved, with written agreement, that one member should assume and pay its obligations, including outstanding commercial paper. Payment thereof was suspended, and was not resumed in fourteen days.

Held, that such suspension was an act of bankruptcy, and the firm must be adjudicated bankrupts. It is unnecessary to allege or prove fraud in such suspension, where payment is not resumed within a period of fourteen days. 1 N. B. R., 181.

In re JOHN WEIKERT AND FRANK M. PARKER.

THIS was an involuntary proceeding—the petition alleging various acts of bankruptcy, and among others, that on the 17th of May, 1869, the respondents, being merchants, had fraudulently suspended payment of their commercial paper, and had not resumed payment within a period of fourteen days.

On the return day, the respondent Weikert did not file any answer. The respondent Parker appeared and filed an answer, alleging that in April, 1869, the partnership existing between him and Weikert had been dissolved by an agreement in writting, whereby Weikert had assumed all the liabilities of the firm; also denying certain other allegations of the petition, but not denying that the commercial paper of the firm had been due and unpaid for more than fourteen days.

Counsel for the creditors moved for an adjudication upon the petition and answer as filed, basing his application upon the undenied allegation of the suspension of commercial paper; and cited in support of his motion, *Claflin* v. *Wells*, 1 N. B. R., 181. *In re* W. C. Cowles, 1 B. R., 42 *quarto*, 280 *octavo*.

Counsel for the debtors contended that the partnership having been dissolved before the suspension took place, that it could not be alleged and proven as an act of bankruptcy against the retiring partner, and that though it was admitted that commercial paper of the late firm was past due, yet the present manager of the business of the late firm was solvent, as he claimed, and could and ought to pay; that the fraud in the suspension was denied, and that the suspension was only *prima facie* evidence of fraud, which ought to be inquired into.

Counsel for creditors replied that any dissolution of the partnership could not affect creditors except by their consent, and that it was proper to commence this proceeding against both parties, to reach that which was partnership property at least, when the debt was contracted; that in the argument of counsel a fraud was proven in the suspension, if it were necessary to prove any fraud, for if the debtors were solvent, and did not pay their commercial paper when due, that was fraud in itself; and if they were unable to pay, then it was their duty to go into voluntary bankruptcy; and cited Judge Blatchford's opinion in the case of *Lowenstein*, 2 N. B. R., *quarto* 306, *octavo* 99.

Judge HALL said that he should adhere to his decision, made early in the administration of the Bankrupt Law, in the case of *Wells*, cited by creditor's counsel, and that he did not consider it necessary to allege or prove any fraud in the suspension, if it had been continued fourteen days. That the fact that this partnership had been dissolved, could make no difference with the liability of the retired partner, who could have saved the odium of bankruptcy by paying the indebtedness, which was the foundation of this case, and compelling his late partner to reimburse him, under the agreement of dissolution.

The adjudication was granted.

Geo. Gorham, of Buffalo, for creditors.

F. E. Cornwell, of Buffalo, for debtors.

UNITED STATES CIRCUIT COURT—DISTRICT OF VIRGINIA.

A holder of a second lien on encumbered realty, assets in the hands of the Assignees in Bankruptcy, and a tenant of the assignees, in their name and with their approval, appealed from two orders of the District Court that the property be sold, and the first lien be received in part payment. The assignees withdrew permission for their names to be used in the proceedings on the appeal; whereupon application was made by the second lien holder and the tenant, to file bill in equity praying appropriate relief.

Held, that the special appellate jurisdiction of the Circuit Court is limited to controversies between assignees and claimants of adverse interests, and to controversies between assignees and creditor claimants.

Appeal would not lie from the orders in question, and would not lie in any case unless made under the conditions prescribed by the Section 8 of the Bankrupt Act.

The general revisory jurisdiction of the Circuit Court, extends to all decisions of the District Court, or District Judge at chambers, which cannot be reviewed upon appeal or writ of error, under the provision of said section.

Leave given to file bill, and proceedings under orders of court below suspended.

In re ALEXANDER.

CHASE, C. J.—A petition has been presented to the court by P. C. Bagley and John Alexander, for the revision of an order of the District Court. It appears that among the assets of the bankrupt was a tract of land encumbered by a deed of trust executed by him on the 24th of December, 1864, in favor of William D. Miller, to secure the payment of three bonds, each for seventeen thousand dollars, payable in four, eight, and twelve years from date, respectively; that the petitioner Alexander is tenant of the tract, under the assignees, claiming a term which will not expire until January 1st, 1870, and that the petitioner Bagley holds a judgment which is a lien on the real estate of the bankrupt, and is claimed to be the next lien after the deed of trust.

On the 16th of March, 1869, the District Court made two orders; one directing the assignees to sell the land, and the other directing that Miller might become the purchaser, and that the assignee should receive the amount of his bid in the trust bonds at par. The petitioners, as soon as these orders came to their knowledge, prayed an appeal, in the name, and with the

approval of the assignees, and immediately notified Miller, and the Clerk of the District Court, of their appeal.

The time for filing the bond on appeal was extended by the order of the District Judge, until the 18th of April, and on the 14th an order was passed showing that the assignees had filed their bond in the penalty of ten thousand dollars. On the 6th of May, the assignees informed the counsel for the petitioners that they would not allow the use of their names in the prosecution of this appeal.

The petitioners, therefore, ask, in consideration of the surprise occasioned to them by this information, and, also, upon the ground that no appeal from the order of the District Judge in such a case as that before him, is allowed by the act, that the court will give them leave to file their petition now presented, and grant them appropriate relief.

The petition invokes the exercise of the jurisdiction of superintendence, conferred upon the Circuit Courts by Section 2 of the Bankrupt Act, which provides that "the several Circuit Courts, within and for the districts, where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity.

In the consideration of this petition it becomes necessary to ascertain, if possible, the nature and extent of the jurisdiction thus conferred.

It is clear that it must be exercised, over proceedings in bankruptcy already pending in the District Court, and it seems to be a reasonable interpretation, that it does not extend to decisions of the District Court, from which appeals may be taken.

By Section 8, appellate jurisdiction of such decisions was conferred upon the Circuit Court in four classes of cases: first, by appeal in cases in equity decided in the District Court, under the jurisdiction created by the act; second, by writs of error in cases at law, decided in the exercise of that jurisdic-

tion; third, by appeal from decisions rejecting, wholly or in part, the claims of supposed creditors; and fourth, by appeal from decisions allowing such claims.

In the first two classes of cases, the appeal or writ of error is given to the unsuccessful party to the suit, whether in equity or at law; in the third class it is given to the dissatisfied creditor; in the fourth to the dissatisfied assignee.

The suits belonging to the first two classes of cases seem to be those of which concurrent jurisdiction is given to the Circuit and District Courts by the 8th Section; for no jurisdiction of cases at law or in equity relating to the estate, rights, or liabilities of the bankrupt, is expressly given to the District Court elsewhere than in the third clause of the 2d Section; though this jurisdiction may be well enough held to be included in the general grant of the 1st Section.

If this view is correct, and the jurisdiction of the District Court under the act, spoken of in the 8th Section, is the jurisdiction defined by the third clause of the 2d Section, the appellate jurisdiction by appeal and writ of error, from decisions in the exercise of that jurisdiction, must be regarded as limited to suits at law or in equity, by assignees against persons claiming adverse interest, or by such persons against assignees.

From these premises, the necessary deduction is that the appellate jurisdiction, strictly so-called, conferred upon the Circuit Courts, is limited to these controversies between assignees and the claimants of adverse interests, and to controversies between assignees and creditor-claimants, touching the allowance of claims.

But there must be, obviously, numerous decisions by District Courts and District Judges sitting at chambers, which are not included in either of these categories.

The order complained of in the petition is an example: It is not a decree in equity; nor a judgment at law; nor a rejection of claim in whole or in part; nor an allowance of a claim. From this order, then, it is clear, no appeal could be taken.

On this point there seems to have been a misapprehension both of counsel and of the District Judge; for an appeal was

allowed, though not in time; and afterwards the time for filing the appeal bond was extended. Of this, nothing more need be said now, than that the right of appeal, as given by the statute, can neither be enlarged nor restricted by the District or the Circuit Court. The regulation of appeals is a regulation of jurisdiction. The Circuit Court has no jurisdiction of any appeal in any case, under the Bankrupt Act, from the District Court, unless it is claimed, and bond is filed at the time it is claimed, and notice of it given, as required by the 8th Section of the act, within ten days after the entry of the decree or decision appealed from; or unless it is entered at the term of the Circuit Court first held within and for the proper district next after the expiration of the ten days from the time it was claimed.

This is mentioned here only to correct the misapprehension which seems to prevail concerning the jurisdiction of this court upon appeals.

Returning, then, to the order mentioned in the petition, and finding it, as already stated, to be one from which no appeal can be taken, the conclusion is inevitable that it is one which may be reviewed in the exercise of the power of general superintendence, or that it cannot be reviewed at all.

It may be said that the superintending jurisdiction does not extend to decisions of the District Court, or of the District Judge at chambers; and, certainly, if it does not extend to both, it extends to neither; for the 1st Section of the act gives the same jurisdiction to the District Judge at chambers as to the District Court. This construction would limit the revisory jurisdiction of the Circuit Court to that given in the 8th Section.

But it is plain that this construction is not the correct one. It would, indeed, nullify the operation of the most important clause of the 2d Section; for it would limit the superintending jurisdiction to the proceedings of assignees and registers, and these seem to be already placed by the first clause under the supervision of the District Court.

The better, and, indeed, as it seems to me, the only con-

struction which gives due effect to all parts of the act relating to revisory jurisdiction, seems to be that which on the one hand excludes from the category of general superintendence and jurisdiction of the Circuit Court the appellate jurisdiction defined by the 8th Section; and, on the other, brings within that category all decisions of the District Court or the District Judge at chambers, which cannot be reviewed upon appeal or writ of error under the provisions of that section.

The exercise of this general jurisdiction is not placed by the act under specific regulations and restrictions, like the proceeding by appeal or writ of error. It was doubtless thought most advisable to leave its regulation to the discretion of the court and to the rules to be prescribed by the Supreme Court. As yet, the Supreme Court has prescribed no rule concerning it, nor has this court.

In the case before us its exercise must depend on the sound discretion of this tribunal. Unreasonable delay in invoking the superintending jurisdiction should certainly not be allowed. Nor, on the other hand, should such excessive rigor be exercised that the ends of justice will probably be defeated.

Leave is given to file the petition, and other questions are reserved until the coming in of affidavits; and in the meantime let further proceedings under the order of the District Court be suspended.

Bradley T. Johnson, for petitioner.

Messrs. Chandler and C. Dabney, for respondents.

UNITED STATES DISTRICT COURT—N. D. MISSISSIPPI. 7

A trader gave promissory notes in part payment of purchases of goods, and before they fell due, sold out the balance of his stock in gross, without invoice, at ten o'clock at night, to a purchaser for ten hundred and thirty-two dollars cash, and went out of business, after paying one of the notes before maturity. He failed to pay the other notes at maturity, and they remained unpaid for more than fourteen days.

Held, it was no defense that the debtor had ceased to be a trader at the period of suspension. The sale for cash was not a sale made in the or-

dinary course of business. The suspension of payment of his paper was fraudulent, and he must be adjudicated a bankrupt.

DAVIS & GREEN *v.* F. M. ARMSTRONG.

HILL, J.—This case in involuntary bankruptcy is submitted to the court upon petition, answer, and proof.

The act of bankruptcy charged is that said defendant, being a merchant, did, on or about the 25th of February, 1868, fraudulently suspend the payment of his commercial paper, and did not resume payment thereof within a period of fourteen days. The answer denies the bankruptcy charged. The issue thus made makes it incumbent upon the petitioners to establish, by proof, the bankruptcy charged. The most important proof is that produced by the defendant, and is found in his deposition, and is substantially as follows: That in the latter part of October, 1867, he purchased, in the city of Louisville, Ky., from various wholesale dealers, a stock of goods for retail, at Red Land, in Pontotoc county, Miss.; that about four thousand dollars of said stock was purchased on a credit, and a portion, about one thousand dollars, for cash; that among the purchases was one from the petitioners for the sum of nine hundred and twenty-six dollars, for which he executed his note, due at four months, and payable on the 24th February, 1868; that he brought the goods to Red Land and offered them for sale at retail until the 26th December, 1868, when he sold out the entire stock remaining on hand, to one Bounds, for the sum of ten hundred and thirty-two dollars, which was paid him in cash. That it was a lumping trade, made without taking any invoice of the stock; that the trade took place between nine and ten o'clock at night; that of the sum so received he paid off and took up one of the notes given for the stock, amounting to five hundred and fifty-eight dollars; that the payment was made before the maturity of the note; that he received a discount of ten per cent.; that he immediately left Red Land, and went to look after his father's estate, some thirty miles distant, his father having recently died; that he then ceased to be a merchant, and has so continued to the present time; that whilst doing business, as a merchant at Red Land as stated, he kept no books, showing

the condition of his business, only kept memorandums; does not know the amount due him, and either does not know or declines to state from whom; states that had it not been for the fall in cotton his estate, real and personal, was at the time of sale to Bounds, sufficient to have paid his debts. He does not state what amount of cash he received for the sale of goods made at retail or the disposition he has made of it, or the disposition made of the balance received from Bounds, but admits that the note due to petitioners remains unpaid; and that on its maturity; he owed on said purchases some two thousand two hundred dollars; does not state whether any part of the same has since been paid.

The main ground of defense relied upon is, that at the time of suspension of payment stated, defendant was not a merchant or trader. This renders it necessary to give a construction to this clause in the Bankrupt Act, and in order to arrive at a correct conclusion, we must ascertain the benefits intended to be secured, and evils remedied.

In all commercial countries, such as ours, it is deemed a matter of the first importance, that obligations and contracts entered into by those engaged in such pursuits, and in the transaction of commercial business, shall be promptly paid, and for the reason that the failure of one, often occasions the failure of others. These obligations, in the shape of notes, bills, checks, etc., form a part of the circulating medium between those, engaged in such pursuits. The reason, therefore, that a distinction is made, in the Bankrupt Act, between merchants, bankers, and traders, in meeting their commercial obligations, and the rest of the community, is to secure promptness and good faith with this useful class of the community; and to secure this desirable object, a fraudulent failure to meet these obligations, is declared to be an act of bankruptcy; such being the object and purpose of the law-makers, the proper construction of the act should be read as follows:

That a merchant, banker, or trader, who, in the course of his business as such, shall execute notes, bills, or other instruments which circulate as commercial paper, and who fails to

pay the same within fourteen days after maturity, or the same shall have become due and payable, without a sufficient excuse for such failure, shall be deemed to have fraudulently suspended payment, and shall be declared a bankrupt.

If this be the true construction of the act, it follows that if the maker of the paper is a merchant, banker, or trader, at the time of its execution, he becomes liable to meet it in the time specified, unless he can show a sufficient excuse for failing so to do, or he becomes liable to this provision of the law, no matter what his occupation may then be. This brings us to another important inquiry, that is, has the defendant shown a sufficient excuse for the non-payment of the petitioner's demand, the note having become payable on the 24th February, 1868, and their proceedings not having been commenced until the 26th of the following June, a period of over four months; or, in other words, was it, within the meaning of the act, a fraudulent suspension? The note was executed after the passage of the act, and the defendant must be held to have assumed all the obligations and liabilities imposed by the act, one of which was that he should keep proper books, showing the true condition of his business, the stock invested, the cash received, cash on hand, debts due him, cash paid out, and debts outstanding against him in his business, a failure to do which, after the passage of the act, is, by the 29th Section, declared to be a cause for refusing the bankrupt a discharge, or, if granted, for its revocation. The defendant has failed to meet this obligation. By the 35th Section of the act it is provided that a conveyance, sale, assignment, or transfer, not made in the usual and ordinary course of business of the debtor, shall be deemed *prima facie* evidence of fraud.

The sale of a stock of goods of five thousand dollars or more, that had only been on sale at retail for about two months, when cotton was down at nine and ten cents per pound, and when money was scarce in the country, made at night, in a lump, without examination or invoice, at the sum of one thousand and thirty-two dollars, cannot be held to be in the *usual* and *ordinary* course of the business of a merchant. Other sections

of the act might be referred to to show that the utmost good faith and fair dealing is required of those so engaging in mercantile pursuits; a failure to observe which, is treated as evidence of fraud.

When a merchant engages in business and purchases his stock, or any part of it, on credit, there is an implied promise that the proceeds of the sale shall be applied to their payment. The merchant commits a fraud upon his creditor if he appropriates the proceeds to any other purpose until the obligation is discharged; indeed, his whole capital stock is virtually pledged for the payment of such commercial liabilities as he may incur in such business; he is further pledged to give to his business his best skill and attention, and a failure to comply with these requisitions may be held a fraud on the rights of those who have given him credit in his business, and whose demands remain unsatisfied. The reason given by the defendant, that he did not pay the note before the commencement of these proceedings, is unsatisfactory. Had the goods been received and sold when cotton was at a high price, and when there was every expectation of easy collections, and then fallen, the reason would have been more plausible; but they were purchased when cotton was at the low price, and should not have been sold on credit only to those able to pay at the low price of cotton.

The low price of cotton would have been a good reason why sales were not made, but if not made, it should have remained on hand, and not sold for the small sum of one thousand dollars or thereabout; upon the other hand, if the goods were sold it was the duty of the defendant, either by himself, or some suitable person employed for the purpose, to collect these debts, or at least to have required the debtors to execute their notes for the amount due.

Although the defendant was permitted to give his own deposition, upon re-hearing of the cause, he has wholly failed to show what amount of cash he received for goods, the amount due and unpaid, or the disposition he has made of the same. These circumstances, together with his whole transaction, con-

nected with his mercantile business, whether so intended or not, must be held, within the meaning of the Bankrupt Act, to have resulted in a fraudulent suspension of the note of petitioner, which is upon its face mercantile paper, and was in fact so executed; and rebuts the excuse given for its non-payment, and must be declared an act of bankruptcy.

The enforcement of this side of the Bankrupt Law is decidedly unpleasant, but when cases arise, they must be met, and disposed of according to law and testimony as the court understands them. Fortunately, so far, out of nearly five hundred cases, not more than twenty have been on the involuntary side of the docket, and not more than half that number have been contested; and of the remaining number but few have come to the final hearing, so that so far, this portion of the law has received but little consideration from either the court or the bar. It may, however, be well that its principles be understood by the community, especially those engaged in trade, that any necessity for its enforcement may be avoided in the future, as in the past.

DISTRICT OF NEW JERSEY.

Where an injunction had been issued under the act by the District Court, staying proceedings against bankrupt in the State courts until the question of final discharge should be determined, and final discharge was granted and motion made to dissolve said injunction,

Held, that the motion was unnecessary, as the order for the final discharge terminated the injunction.

In re VEEDER G. THOMAS, *a Voluntary Bankrupt.*

MOTION by creditor to dissolve an injunction after final discharge.

On the 25th day of March, A.D. 1869, an injunction was granted by Judge Field upon the petition of said bankrupt, restraining a creditor from prosecuting his suit against said Thomas in the State court of New York, until the question of the debtor's discharge should have been determined. On the

25th day of May, 1869, the said bankrupt received his final discharge in bankruptcy.

Upon motion, this day made, to have the said injunction dissolved, it was held that the effect of the final discharge was to terminate the injunction; that no order to show this termination would be necessary. The language of the injunction was in accordance with the statute, and continued in force only until the question of the final discharge could be determined. The bankrupt must hereafter use his discharge as his protection, in cases thereby affected.

William L. Dayton, attorney for creditor.

UNITED STATES CIRCUIT COURT—DISTRICT OF VIRGINIA. 9

Assignees in bankruptcy of a firm sent back to the Register for additional proof a certain claim of M., proved by the oath of a member of the firm as trustee of the claimant. On application to the District Judge by the counsel of the trustee, it was ordered that a dividend on the claim be paid. The assignee was not heard on the application, and petitioned the Circuit Court to review the case.

Held, the District Court has power, upon petition of the contesting creditor, to reverse the decision of an assignee rejecting his claim, but the mode of proceeding must be regular, and the assignee should have opportunity to answer and contest the claim. Order of the District Court reversed.

Semble, that a member of a bankrupt firm cannot represent claims against the estate.

In re MITTELDORFER & Co., *Bankrupts.*
Ex parte RUTHERGLEN, *Assignee.*

CHIEF JUSTICE CHASE.—It appears in this case that Moses Mitteldorfer, one of the bankrupts, filed with the Register a claim in behalf of Rosalie Marcuse for six thousand eight hundred and forty dollars. This claim, proved by the oath of Mitteldorfer, was referred, together with the others, against the estate of the bankrupts, by Register Bond, to the assignees, Andrew Rutherglen and Horace L. Kent. Upon examination, some of the claims were allowed, and others rejected. The claim of Mitteldorfer, in behalf of Mrs. Marcuse, was among

the rejected claims, and with the others, was returned to the Register for further proof, if any could be made.

In this state of facts, a petition was presented to the District Judge, for an order directing the assignees to pay a dividend on this claim to Mitteldorfer as trustee, equivalent to that paid on the admitted claims. This dividend was twenty per cent. on six thousand eight hundred and forty dollars, and amounts to one thousand three hundred and sixty-eight dollars.

The first order to this effect was made on the 20th of February, 1869. This order not having been complied with by the assignees, a peremptory order was made on the 30th of March, 1869, reciting the original order, and requiring a compliance with it.

The object of this petition is to obtain a revision and reversal of these orders. The act, in the 22d and 23d Sections, requires that the proof of claims be made before the Register, or Commissioner, and transmitted to the assignee, who is to *examine* the same and compare it with the books and accounts of the bankrupt, and register the names of the creditors who have proved their claims. This seems to have been done in the bankruptcy under consideration. The claim of Mitteldorfer as trustee for Mrs. Marcuse, was sworn to before the Register, and transmitted to the assignees, and upon examination rejected by them and returned to the Register to be held for further proof. No further proof in this claim seems to have been offered, but Mitteldorfer presented his petition directly to the District Judge for the orders referred to.

It does not appear that due notice of this petition was given to the assignees, or that opportunity was given them to contest the claim.

It cannot be doubted that the District Court has power, upon the petition of any creditor whose debt has been rejected, to revise the decision of the assignee rejecting it. But the mode of proceeding, in the present case, seems to me to have been irregular. The assignees should have had an opportunity to answer the petition and contest the claim, and if, upon con-

sideration, the court had determined that it should be allowed, an order should have been made requiring the assignees to place it upon the list of admitted claims, and to pay dividend accordingly.

It does not appear to me clear that one of the bankrupts should be allowed to represent any claim against the estate; but I leave this matter for the present to the consideration of the District Judge.

The orders complained of will be reversed and the case remanded for further proceedings.

Mr. Rutherglen, for assignees.

Mr. L. A. Chandler, for respondent.*

DISTRICT COURT FOR THE CITY AND COUNTY OF PHILADELPHIA, PENNSYLVANIA.

Where a creditor having a judgment against a bankrupt which is a lien upon his real estate proves his debt in bankruptcy, and comes in upon the bankrupt's estate for the whole debt, the assignee in bankruptcy is entitled to be subrogated to the rights of the judgment creditor as regards its lien upon the real estate.

WALLACE *v.* CONRAD.

THAYER, J.—The fund in court was derived from the sale of certain real estate belonging to Peter Conrad under a *levari facias*, issued on a judgment obtained on a mortgage. The sheriff's sale was January 4th, 1869. On the 20th December, 1867, the defendant, Conrad, executed a general assignment

* See *in re* Ray, 1 N. B. R., *octavo*, 203; *in re* Patterson, 1 N. B. R., *octavo*, 100; *in re* Jones, 2 N. B. R., 59, *octavo*; *in re* Paddock, 6 N. B. R., 130.

The application may be made to the Register in charge of the case. Rule XXXIV.

Comstock v. *Wheeler*, 2 N. B. R., 561, *octavo*.

And it may be contested on any ground (including usury) that the bankrupt could have plead to an action at law. *In re* Prescott, 9 N. B. R., 385.

The claim of the petitioning creditor may be contested by the assignee. *In re* Cornwall, 6 N. B. R., 305.

for the benefit of creditors. On the 4th of February, 1868, a petition in bankruptcy was filed against him, and in those proceedings the assignment of December 20th, 1867, was declared an act of bankruptcy, and on the 4th of March, 1868, he was adjudged a bankrupt. After the general assignment made by the defendant, and before the commencement of the proceedings in bankruptcy against him, other judgments were obtained against him. After paying the liens first, in order of time, there remained a balance of one hundred and ninety-five dollars and eighty-six cents, which was claimed on the one hand by the assignee in bankruptcy, and on the other by the creditors whose judgments were obtained after the general assignment was made, and before the commencement of the proceedings in bankruptcy. The assignee in bankruptcy claims the fund as against those judgment creditors upon two grounds: 1st. Upon the ground that the general assignment, being void as a fraud upon the Bankrupt Act, and being itself an act of bankruptcy, the title of the assignee in bankruptcy relates back to the date of this act of bankruptcy, and so cuts out the judgments intervening between the act of bankruptcy and the commencement of the proceedings in bankruptcy. 2d. Upon the ground that Goehman's executrix, a creditor, who held a judgment for thirteen hundred dollars, obtained against the defendant before the act of bankruptcy, having elected, before the sheriff's sale, to prove her whole debt under the Bankrupt Act, she thereby surrendered her judgment for the benefit of the creditors of the bankrupt, and the assignee representing them is entitled to be subrogated to her lien under that judgment, and to have the benefit and protection of the lien which she had by virtue of her judgment. The auditor awarded the disputed balance, one hundred and ninety-five dollars and eighty-six cents, to the bankrupt's assignee. It may admit of a very grave doubt whether the title of the assignee related back to the act of bankruptcy in such manner as to cut out the lien of the judgments obtained after the act of bankruptcy and before the commencement of the proceedings in bankruptcy. By the 14th Section of the Bankrupt Law, it

is declared that the assignment to the bankrupt assignee "shall relate back to the commencement of said proceedings in bankruptcy, and thereupon by operation of law the title to all such property shall vest in said assignee." By the 38th Section, "the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, shall be deemed and taken to be the commencement of proceedings in bankruptcy." By the 39th Section, any person "who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, surety, or otherwise, or with intent, by such disposition of his property, to defeat or delay the operation of this act, * * * shall be deemed to have committed an act of bankruptcy, and shall be adjudged a bankrupt on the petition of one or more of his creditors. And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this act; provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, or that the debtor was insolvent." By the 20th Section, existing liens against the bankrupt's estate are preserved. Although, therefore, the bankrupt's assignee may recover the property conveyed in contravention of the act, it is very doubtful whether he does not take it subject to all liens acquired in good faith before the commencement of proceedings in bankruptcy. It would seem that if it had been the intention of the act to prefer the title of the bankrupt's assignee to such liens, the act would have made the assignee's title to relate back to the act of bankruptcy. Whereas, by the express words of the 14th Section, it is provided, that it "shall relate back to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to all such prop-

erty shall vest in said assignee." In *McLean* v. *Meline* (3 McLean, 200), Judge McLean decided that under the Bankrupt Act of 1841, a general assignment for the benefit of creditors, made by an insolvent, was void as a fraud upon the act, but that, nevertheless, judgments obtained after the assignment, but before the petition was filed, were valid liens upon the bankrupt's estate, and bound it; and he held that the English rule, which, under their statutes, avoided all liens obtained after the Act of Bankruptcy, did not prevail here under our Act of 1841, that act being more restrictive in this respect than the English statutes. The Act of 1841 divested the bankrupt's estate from the time of the decree in bankruptcy. It is not necessary, however, to decide this point in order to maintain the distribution reported by the auditor, for we are clearly of opinion that the second point made by the assignee in bankruptcy is well taken, and that the assignee representing the general creditors is entitled to avail himself, for the benefit of those creditors, of the lien of the judgment of Goehman's executrix. When she elected to prove her whole debt in bankruptcy, and to come in upon the bankrupt's estate for it, she thereby surrendered her judgment for the use of the assignee, who is entitled to be subrogated to the lien which she had. This is the fair and necessary inference from the language of the 20th Section, which provides that, "When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, *or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt.*" And by the 21st Section it is provided that, "no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity, therefore, against the bankrupt; but shall be deemed to have waived all right of action and suit against the bankrupt. And all proceedings already commenced or unsatis-

fied judgments obtained thereon, shall be deemed to be discharged and surrendered thereby." It is objected that if the Goehman judgment was discharged by proving the debt in bankruptcy, it is impossible that it should be in force for the benefit of the assignee in bankruptcy, or for any purpose. But this objection is more nice than sound. The language of the act is "discharged and surrendered," and, reading it in connection with the provision of the 20th Section, which requires the creditor "to release or convey his claim to the assignee" as a preliminary condition to his being admitted to prove his whole debt, it is impossible, we think, to avoid the conclusion that the meaning of the language used in the 21st Section, is, that the unsatisfied judgment is to be discharged as to the creditor proving his debt, and surrendered to the assignee for the benefit of the other creditors. This interpretation is not only the natural one, and consistent with the language of the act, but is the only one which is in harmony with the whole scope and tenor of the various provisions relating to this subject. It is clear that the assignee might have demanded, as a preliminary to the proof of the Goehman debt, the conveyance of the judgment to him for the benefit of the creditors. In such a case that shall be considered as having been done, which ought to have been done, for it would be contrary to the plainest equity if the creditor, representing the Goehman judgment, should be allowed to come in upon the bankrupt's estate for his whole claim, to the detriment of the general creditors; and, at the same time, they should not be subrogated to his rights under the judgment, and entitled to the protection of his priority, over subsequent judgments.

The exceptions are dismissed, and the distribution reported by the auditor is affirmed.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

In re LATHROP, LUDINGTON & Co.—*Involuntary Bankruptcy.*

IN this case Mr. Da Costa, on behalf of petitioning creditors, moved for an adjudication of bankruptcy.

Mr. Augustus F. Smith appeared for the debtors, Messrs. Lathrop, Ludington & Co. The question presented was, as to whether, in case he should withdraw his appearance, and suffer a default to be taken against his clients, all the allegations in the petition should be taken as true in subsequent proceedings for their discharge, and the court decided that question in the negative, to the effect that the debtors would not be prejudiced in their application for a discharge by submitting to such default.

UNITED STATES CIRCUIT COURT—S. D. NEW YORK.

An order was made in the District Court on the 8th of May, rejecting and expunging certain debts and proofs thereof, and awarding to the assignee costs to be taxed against the creditors whose debts were rejected, and ordering that the assignee recover judgment against said creditors, and that he have execution against them therefor, from which the said creditors appealed.

Held, the order was not one from which an appeal would lie, and the appeals not having been claimed and noticed within ten days after the entry of the decision appealed from, they must be dismissed.

In re MORRIS KYLER.

BLATCHFORD, J.—This is a motion to dismiss appeals taken to this court, from a decision made by the District Court on the 8th of May, 1869, rejecting and expunging from the proceedings herein, certain debts and the proofs thereof. The evidence of such decision is an order made by the District Court on the 8th of May, 1869, and filed in that court on that day, rejecting and expunging such debts and proofs. The appeals were claimed, and notice given thereof to the Clerk of the District Court, and to the assignee, as prescribed in the 8th

Section of the act by notices, each of which states that the appeal claimed is an appeal "from the decision of the judge of the District Court, aforesaid, made on the 8th day of May, 1869, refusing to allow the claim" of the appellant. These are the only appeals which appear to have been claimed, and the only notices which appear to have been given of any appeals.

The 8th Section of the act provides that where a supposed creditor, whose claim is rejected, appeals from the decision of the District Court to the Circuit Court of the same district, the appeal shall not be allowed unless it is claimed, and notice thereof given to the Clerk of the District Court, and to the assignee, within ten days after the entry of the decision appealed from. In the present case, no appeal from such decision of the District Court was claimed, nor was any notice of any such appeal given within ten days after the 8th of May, 1869.

The point taken, on the part of the appellants, that (because the order of the District Court, entered on the 8th of May, 1869, awarded to the assignee costs to be taxed, to be paid by the creditors whose debts were rejected, and ordered that the assignee recover judgment against them therefor, and have execution against them therefor), it was not an order from which an appeal could be taken, and that an appeal could be taken only from a decree to be entered after the taxation of the costs, (embodying the decision rejecting the claims and judgment for a sum certain as taxed costs) only goes to show that the alleged creditors (in appealing from the decision, as a decision made on the 8th of May, 1869), appealed prematurely.

As the appeals from the decision actually appealed from were not claimed and noticed within ten days after the entry of such decision, they must be dismissed.

A. L. Sanger, for the appellant.

Cotterill Brothers, for the assignee.*

* *Hawkins* v. *National Bank, Hastings*, 2 N. B. R., 358, *octavo*.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

Where the members of a firm which is insolvent make a conveyance of all their joint personal property to creditors who have reasonable cause to believe the firm to be insolvent, and within four months thereafter, one of the firm is adjudged a bankrupt on his own petition, the conveyance to such creditors by all the partners does not constitute a preference which the assignee of the bankrupt partner can avoid.

W. J. FORSAITH, *Assignee, v.* GEORGE MERRITT *et al.*

LOWELL, J.—The bill alleges that Charles A. Church and Amos M. Farnum, both now of Boston, were co-partners doing business in Chicago, from December, 1867, to June, 1868; that on the 4th day of the latter month they were insolvent and dissolved their partnership, and on the same day made a conveyance of nearly all their joint personal property to the defendants, George and John Merritt, who were creditors of the firm, and who had reasonable cause to believe the said Farnum & Church to be insolvent; that, within four months afterwards, the said Church was declared a bankrupt, in this district, upon his own petition, and the complainant has been duly appointed and qualified, as assignee of his estate. The bill makes the former partner, Farnum, a defendant, and prays for an account of the partnership dealings, and that the conveyance may be set aside. George and John Merritt join in one demurrer, and Farnum demurs on his part.

The gist of the complaint against the two defendants first named, is fraudulent preference, and the demurrer raises the question, whether such a preference is shown as the complainant can set aside.

This is admitted to be a case of new impression. The general rule is, that a partnership, being dissolved by the bankruptcy of one partner, his assignee becomes tenant in common with the other partner, and that each has the right to the possession and management of such of the joint property as he may happen to have, subject to account to the other. It is said by Mr. Justice Story, *obiter*, that it may sometimes be indispensable that the District Court, as a court of equity, should

take into its own hands the exclusive management and settlement of the joint assets, and inhibit the other partners from intermedding therewith; but that it will do so with caution, and solely for the purposes before stated by him, that is, for paying the joint debts, and dividing the surplus. *Parker* v. *Muggridge*, 2 Story R., 347. And Judge Ware decided that if the remaining partner is insolvent, the case has arisen in which such action might be taken; and he decreed to the assignee under such circumstances the possession of joint books and accounts as against the partner who was not technically bankrupt. *Ayer* v. *Braston*, 5 Law Reporter, 498. But no case has ever gone the length of deciding that a preference by two partners could be avoided by the assignee of only one. One difficulty in the way of such a decision is that a preference is the payment of a just debt, and is valid at common law and in equity, and can only be defeated in bankruptcy under certain circumstances, as where the payment or conveyance is made in contemplation of bankruptcy, and within six months before the proceedings are begun in the Bankrupt Court; but only one of the debtors in this case ever has become bankrupt, and this petition was brought more than six months after the conveyance charged to be a preference was made; so that it never can be said that within six months of his bankruptcy the defendant, Farnum, made the conveyance. The fraud itself, by its definition, cannot exist unless the act is done in contemplation of bankruptcy and within a certain time before bankruptcy, and being a joint act, bankruptcy must have been contemplated by both partners, and must follow as to both within the specified time, or the preference becomes merely the payment of a just debt. The remedy for the joint creditors was clear and ample, to have both partners adjudged bankrupt; but they have not taken this course, and the fact of bankruptcy and the intent to prefer do not both exist; there may have been the intent, but there has been no corresponding act—that is, no bankruptcy within six months.

Again, the assignment to an assignee of one partner does not vest the joint property in him. It has been held, for ex-

ample, that it does not dissolve an attachment of joint property theretofore made at the suit of a joint creditor. *Fern* v. *Cushing*, 4 Cush., 357.

He gets only an undivided half, subject to all equities in favor of the other partner, and subject to all valid liens. His own equities must be worked out through the title of his assignor; and, I understand Judge Ware's decision, above cited, to rest upon the principle that after a dissolution the retiring partner has a right to insist that the joint creditors shall be treated alike and paid *pro rata*. But the assignee is not vested with the joint property by mere force of the proceedings in bankruptcy, and whether it has been conveyed in fraud or not, is to him immaterial. This would appear clearly if the whole partnership affairs had been settled, whether fraudulently or not; because then there could be nothing for the Bankrupt Court to act upon, no joint assets to administer, and no equities to enforce. The right of the separate assignee to administer joint assets is a mere incident to his position as the lawful representative of one partner. I am not deciding now upon the effect which this conveyance may have upon the discharge of Church, nor what the rights of assignee would be to set aside any transfer of Church's interest in the joint property. The bill avers that Church held no such interest, because it says that the firm was insolvent.

W. A. Herrick and *W. J. Forsaith*, for the complainant.

H. A. Clapp, for the defendants.*

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

The bankrupts agreed to build a locomotive engine for the petitioners. They notified the petitioners that the engine was finished and dispatched, who thereupon paid the price. No such engine then existed,

* And the reverse of the proposition in this case is also true. A fraudulent assignment by one partner of his individual property is not an act of bankruptcy of the partnership. 9 N. B. R., 408.

but two engines, either of which would answer the contract, were afterwards finished, and one of them was delivered to a third person before the bankruptcy. At the date of the bankruptcy the other was finished, but not dispatched.

Held, that the petitioners had a title to the engine as against the bankrupts and their assignees by estoppel.

THE ROCKFORD, ROCK ISLAND & ST. LOUIS R. R. Co., *Petitioners*, *In re* MCKAY & ALDUS.

LOWELL, J.—The bankrupts, through McKay, the business partner, who did all the acts, and conducted all the correspondence hereafter mentioned, made an oral contract in the city of New York, on or about the 1st of September, 1868, to build a locomotive engine for the petitioners, a railroad corporation established in the State of ——, whose principal business office was in the city of New York, where Mr. Boody, their treasurer, resided. The terms of the contract were not very fully disclosed by the evidence, but from the subsequent dealings of the parties it is to be inferred that the engine was to be finished as soon as practicable, and dispatched to the road of the petitioners, and paid for in cash at the same time. On the 3d of September, the bankrupts wrote to the President of the Company that they were at work on the engine and would finish it with all possible dispatch. On the 3d of November, they wrote to the treasurer that they had drawn on him at sight for nine thousand dollars, as the amount due for the engine, and had forwarded the receipt and invoice. This paper, called receipt and invoice, is not produced, but it appears by the correspondence to have been a paper purporting to be signed by a transportation company for the delivery of the engine at Cedar Rapids. Mr. Boody replied on the next day that he had received and paid the draft, but that there was a mistake in the bill of lading, which should have been for Chicago instead of Cedar Rapids. The bankrupts replied on the next day that they had corrected the mistake, and had ordered the engine to be sent to the proper address. On the 4th of December, Mr. Boody wrote that the engine had not yet arrived, and asked McKay to trace it and hurry it forward. On the 14th he wrote again, and complained that six weeks had passed since

the engine was shipped, and that it had not arrived, and that he thought the transportation company were liable in damages. On the same day McKay & Aldus wrote him that they had some trouble in their business which had caused the delay; that this was now all over, and that the engine would go forward the next day. December 15th, Mr. Boody replies; "I am glad to be informed that our engine will go forward to-day. I am at a loss, however, to understand how trouble in your business should affect the delivery by the Sol. Tr. Co., of an engine receipted for by them six weeks ago, and which was in no sense whatever *your* property." At what precise time this letter was mailed does not appear. On the same day, McKay & Aldus filed their petition in this court, on which they have been adjudged bankrupts; and this proceeding is against their assignees to have the engine delivered up to the railroad company. It appeared at the hearing that McKay & Aldus had not finished this engine on the 4th of November, and, indeed, that it did not then exist as an engine; and it did not appear that they then had any engine corresponding to the order, or that any was ever delivered, formally or otherwise, to the transportation company. During November, they were at work on two engines precisely alike, either of which would have answered the contract. When the first was nearly finished, Mr. McKay at one time expressed an intention to send it to the petitioners, but did not do so, and delivered it to the Hartford and Erie Railroad Company of Boston. The engine now in question was afterwards proceeded with rapidly, and was known in the shop as the Boody engine, and was marked with the name of the petitioners. On Saturday, the 5th of December, it was within a few hours of completion, and would have been finished that day and shipped on the Monday following, but for an injunction which was issued out of this court upon a petition of creditors, asking for an adjudication of bankruptcy against the firm. On the 14th day of December, the petitioning creditors' attorney agreed with the attorney of the bankrupts that the injunction should be so far modified as to release this engine, and it was then finished, or substantially so;

but afterwards a creditor attached it, under the State Law, and it could not be shipped. After the voluntary petition was filed, the proceedings *in invitum* were given up, and the assignees have been elected under the former, and their title relates to the 15th of December. After the bankruptcy, and before the appointment of assignee, Mr. Boody's son came to Boston, and demanded the engine, by the authority, and in the name of the petitioners, but was not allowed to take possession of it.

The question now presented is, whether the title to this chattel is in the petitioners or the respondents. The assignees of McKay & Aldus have the same rights as the bankrupts had, and no more. They take subject to all liens, incumbrances, and equities, in the same manner as executors, excepting that, by the terms of the statute, liens by attachment are dissolved unless they have been standing for four months, and that assignees may set aside all conveyances made in fraud of the general body of the creditors. The question therefore is whether as between the bankrupts and the petitioners the title had passed on the 15th of December. The property in a chattel passes whenever by a valid contract the owner undertakes that it shall pass; but the chattel must be in existence, and must be capable of being distinguished from other like chattels, before the title will change, because until that time there is no definite subject upon which the contract can operate. In the case of a contract to manufacture a chattel, the general rule is that the property does not pass until it has been finished, and until the maker has in some manner appropriated it or set it apart for the particular customer, and the latter has accepted it. It is said that until this is done, the manufacturer, on the one hand, may deliver the goods to any other customer, and the purchaser, on the other hand, may reject the goods if they do not conform to the order. The question in the late cases has therefore been of a definite appropriation on the one side, assented to on the other. (*Carruthers* v. *Payne*, 5 Bing., 270; *Wilkins* v. *Bromhead*, 6 M. & G., 963; *Elliott* v. *Pybus*, 10 Bing., 512; *Rhodes* v. *Thwaites*, 6 B. & C., 388; Benjamin on

Sales, p. 260 & pp. 268, 270.) Everything depends, however, on the contract, and if the parties choose to agree that the property shall pass before the work is done, they can do so; and this may be implied as well as expressed. Thus, in those cases of ships paid for by installments, of which *Woods* v. *Russell*, 5 B. & A., 192 was the first, an inference has been derived from the mode of payment and other circumstances, and however much any of those cases may have been criticised, they are not open to any just remark in matter of principle, but only upon the propriety of its application in the particular case. The agreement to pass the title may have been inferred too hastily, but the competency of the parties to make such an agreement cannot be questioned. There may be cases, of course, in which the manufacturer would have no right to appropriate the goods to another customer, as in the instance of a portrait, painted to order; and there may be others where the purchaser may have waived his right to reject the article and left it to the judgment and honesty of the maker to comply with the terms of the bargain. If both these elements concur, there is no reason why the property should not vest in the purchaser on the completion of the work. It is not denied that if this engine had been made on the 4th of November, the title would have passed; but it is said the minds of the parties never met in relation to this engine. It may be maintained with some force that the petitioners having been induced by the misrepresentation of the bankrupts to accept the chattel before it was finished, that when it was finished and the petitioners were notified that it would be sent away, the title was complete by relation to the former acceptance.

But there is another view which seems to me to establish a title in the petitioners by estoppel. The bankrupts and their assignees cannot deny that there was an engine finished and set apart for these petitioners, and paid for by them early in November. Here is such an engine. If this is not the engine referred to in the correspondence, it is for them to show the other, which was. Suppose the bankrupts had never built any other engine like this, would they not be estopped by their acts

and correspondence to deny that this chattel was complete on the 4th of November? The fact that there were two chattels precisely alike does not embarrass the case at all. If, when both were in the bankrupts' machine-shop the petitioners had demanded one in particular, the bankrupts could not have been permitted to say that neither had been appropriated to this contract, because it was on the distinct statement that one had been appropriated, by being pointed out and delivered in some way to the transportation company, that they had obtained payment of the price; and so, to defeat an action for the one, they must have been able to show that it was the other that was so appropriated. This they cannot do, for the contrary is the truth. The argument was that the estoppel could not apply to a chattel not *in esse* when the misrepresentation was made. But the foregoing consideration appears to be a sufficient answer, namely, that the assignees are estopped to say that it was not *in esse*, unless they show some other engine to which the representation did apply.

H. W. Paine for the petitioners.

D. Foster for the respondents.*

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

The surplus funds in the hands of the assignee, after the settlement of the estate, where no debts have been proved, and there is reasonable cause to believe that none will be proved, are to be paid to the bankrupt upon the filing of a petition on oath by him, setting forth his reasons for believing that no creditors desire to prove their debts, and asking that the funds shall be paid to him.

In re A. W. Hoyt.

Lowell, J.—The assignee in this case petitions for leave to transfer to the bankrupt the net assets in his hands, the case having been in court for a long time, and fully settled in the usual way, and no creditors having proved their debts, and

* The same rule held where the purchasers became bankrupt; *in re* Wood Mowing and Reaping Machine Co., 9 N. B. R., 395.

there being good reason to believe that none intend to do so. The bankrupt was discharged more than a year ago.

After the debts are paid, the assignee is a trustee for the bankrupt. (*Charman* v. *Charman*, 14 Ves., 580.) And the debts are those which have been duly proved to be such. The assignee is not an agent to pay the bankrupt's creditors against their will; and their will to be paid can be shown only by their acts in court. There are no creditors but such as prove their debts. The schedule may show that there are said to be possible creditors, but the schedule may be mistaken, or all the schedule creditors may have security, as is said to be the case here; or they may have other reasons, satisfactory to themselves, for not wishing to prove their debts. Until they do prove, the assignee has no concern with them, excepting to see that they are notified, and have full information of the proceedings, and an opportunity to come in if they wish to do so. When this or a similar petition was first presented in this case, I postponed its consideration in order to make sure that such opportunity had been afforded. In the meantime there has appeared a summary of two cases, in which it is said to have been decided that the asssignee, after paying in full the debts which have been proved, must apply the surplus to the payment of such as have not been proved. (*Re* James, 2, N. B. R., 78 *quarto*, 227 *octavo*; *Re* Haynes, *Ib.*) I apprehend there must be some mistake in the brief reports of these cases. What the learned judge insisted on must have been, I suppose, that non-proving creditors should be carefully warned and notified. There is no warrant in the statute for paying a dividend to such persons; on the contrary, all the sections upon the subject, expressly, or by necessary intendment, refer to creditors who have verified their debts in the mode required by law. In England, this matter is regulated by Statute 12 and 13 Vict., C. 106, Section 117; but the law is the same here, because by force of the assignment there is a resulting trust, after the express trusts have been fulfilled; and it is not any part of an assignee's trust to seek out and satisfy supposed creditors, who do not choose themselves to come forward. The bankrupt

should file his petition on oath, showing his reasons to believe that no creditors desire to prove, and asking to have the fund paid out to him, and it will be granted.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

The debtor may obtain his discharge, although the publication of the notice of the appointment of the assignee has been made three times in the course of two weeks, instead of once a week for three successive weeks, as required by the act.

The debtor may also obtain his discharge, notwithstanding that the second and third meetings are not held at the expiration of three and six months respectively, from the date of the adjudication.

It is the duty of the debtor to be ready for examination upon due notice, but he need not notify the creditor when and where the examination is to be had.

The bankrupt, who is a tradesman, must keep a cash-book, otherwise he cannot obtain his discharge.

In re Hiram Littlefield.

Lowell, J.—The first objection taken to the discharge of this bankrupt is, that the notice of the appointment of his assignees was not published in the mode pointed out by Section 14 of the act. It seems, that instead of being published once a week for three successive weeks, this notice was, in one of the newspapers, published three times in the course of two weeks. This is not a ground for refusing the discharge. The courts have held, and wisely, that the bankrupt is bound to see that the proceedings are regular, and if they are not so, he cannot have his discharge. But the courts that have made this law without much aid from the statute must construe it reasonably. The bankrupt ought not to be held responsible for all the shortcomings of his assignee, over whom the statute gives him no control. If the latter has neglected his duty in accounting for assets, or in recording his assignment, or in any other matter which relates only to the proper discharge of his own trust, and not to the essential validity of the proceedings —that is a matter which the creditors and the court can take care of. Where there is any failure of jurisdiction, as where,

by mistake, the case had been conducted by the wrong Register, I have refused the discharge; so, probably, as matter of practice, the meetings ought to be duly warned and held before the discharge can be granted, because the act intends that the creditors shall have due and full opportunity to meet and consult before the proceedings are closed. This is fairly to be inferred from the whole scope of the act. But even this does not go to the jurisdiction to grant a discharge. I am not able to see that the publication by the assignee of his appointment is essential to the regularity of the proceedings. It is directory to the assignee, and not intended so much for creditors as for persons owing debts to, or otherwise having business with, the estate. Creditors whose names may be omitted from the schedules are cared for in the provision for publishing notice of the warrant and the meeting.

The next two specifications are that the second and third meetings were not held immediately upon the expiration of three months and six months respectively after the adjudication was made; and that the omission was not without the fault of the assignee. The language of the statute on this head is certainly somewhat peculiar. The meetings are to be held at three months and six months, or earlier, if practicable; and "if by accident, mistake, or other cause, and without fault on the part of the assignee, either or both the second and third meetings should not be held within the times limited, the court may, upon the motion of an interested party, order such meetings with like effect as to the validity of the proceedings, as if the meeting had been duly held."

It is impossible to understand all the provisions of the Bankrupt Act without recollecting that it was borrowed, in large part, from the well-matured systems of Massachusetts and of England, and that in adapting it to the United States some natural discrepancies have crept in. Now, by the law of Massachusetts, it was at one time essential that the second meeting should be held no more than three months after the date of the warrant, and it was only at that meeting that the insolvent could take the prescribed oath or obtain his certificate. After-

wards the oath was to be taken at that meeting and the certificate was to be granted at the third meeting, which, too, was to be held within a given time after the appointment of the assignee. It consequently sometimes happened that the debtor lost his right to a discharge by the neglect of his assignee to call those meetings in season, for there was no power to call them afterwards, nor to do the necessary acts at any other meetings. This law was afterwards modified in some respects, and in 1854 the Legislature passed an act, which is now incorporated in the General Statutes of the State, Chapter 118, Section 73, precisely like the above-cited provision of the Bankrupt Act, excepting that it is general and not confined to cases of "accident and mistake." A comparison of its language with that of the Bankrupt Law shows clearly that the latter was copied from it. By the Bankrupt Act, however, there is no necessity for any such clause, because it is not essential that the second and third meetings should be held at any particular time, but only that they should be held *at the expiration* of certain months, etc.; and unless this means on the very day that the months run out, there is no day on which it can be said that it is too late to hold these meetings, unless, possibly, it may be said that the second meeting should be called before the end of six months. Nor does the Bankrupt Law require that the necessary oath should be taken or the discharge be granted at one of these meetings, or that they, being held at any particular time, shall be in any way essential to the validity of the proceedings. So that, although it is the duty of the assignee to call the meetings at the expiration of the time mentioned, and he may be required to do so and may be liable for his neglect if any injury results from it, yet neither the debtor's discharge nor anything else touching the regularity of the proceedings depends upon their being held on the days when those months respectively expire. And if they are not held, I am not ready to decide that any creditor or the debtor may not call upon the court to require them to be held, though it may have been the fault of the assignee that they were not sooner called, else it would be in the power of the assignee to

take advantage of his own neglect, and to defer, indefinitely, the accounting which the law requires of him at those meetings. But if all this is wrong, yet the meetings in this case having been called by order of the court, it must be presumed that good cause was shown for the action of the court in the premises.

The next specification is that the debtor refused to submit himself to examination, as required by the act. The fact is, that the debtor was summoned before the register to be examined, and made some objections, which were referred to the court and overruled; and the creditor, who is the same now objecting, never pressed for a further hearing. He now takes the position that it was the debtor's duty to notify him when and where the examination would be proceeded with. This is a mistake. It was for the creditor to examine the debtor if he desired to do so, and to see that due appointments were made with the register for that purpose, and to give the other party notice of them. The debtor's duty was performed when he was ready to be examined on due notice, and the evidence in this case shows that the debtor was ready. Whether, if a bankrupt, being present at a legal hearing, refuses to be examined without good cause, there is any remedy except by motion to commit, I need not now decide; but I apprehend it will be difficult to find any.

The only other specification which the evidence makes important is the ninth—that the bankrupt did not, after the passage of the act, and before filing his petition, keep proper books of account. It seems that the debtor was a man of an enterprising spirit, who engaged in a variety of schemes, none of which were successful. Among other things he kept a wharf where he sold wood and coal. His books of this business were kept by a skillful clerk, who kept such books as were kept, skillfully; but there was, during the last part of the time, no cash account whatever, and this by the bankrupt's own act. I regret to be obliged to decide that for this omission the bankrupt must be held to come within the penalty of the statute. A cash account is necessary to an understanding of a trader's

business, and it has been decided by two courts that the want of it is fatal under this act. The specification is very general, and I thought at first that it might be held insufficient, but upon the hearing, I could not see that any injustice would be done by hearing the evidence. If the objection were that certain entries were wanting, or that there were irregularities in the mode of keeping proper books, they ought to be pointed out in the specifications; but where the objection is that a cash account, which all traders should keep, is wholly wanting, it seems to me that the general specification is enough. Besides, an amendment, in so simple a matter, ought not to be refused.

Petition for discharge denied.

C. Lamson for the objecting creditors.

J. C. Perkins for the bankrupt.*

UNITED STATES CIRCUIT COURT—DISTRICT OF IOWA.

1. BANKRUPTCY.—*Appellate jurisdiction of the Circuit Court.* If under Section *eight* of the Bankrupt Act, the order of the District Court discharging a bankrupt can be reviewed in the Circuit Court by appeal or writ of error.
2. It certainly cannot be reviewed upon error, where the record presents only questions of fact.
3. But under the *second* Section of the Bankrupt Act, which gives the Circuit Court "superintendence and jurisdiction of all cases and questions arising under the act, * * upon bill, petition, or other proper process of any party aggrieved," any creditor considering himself aggrieved by the discharge of the bankrupt, has a right to be heard on that matter in the Circuit Court.
4. In such a case a writ of error was dismissed, and the plaintiff in error remitted to other proceedings, by petition or otherwise, under the *second* Section.

ELIZA J. RUDDICK *v.* J. B. BILLINGS.

MILLER, P. J.—This is a writ of error in the District Court,

* *In re* Bellamy, 1 N. B. R. *octavo*, 97, would seem to require a more strict proof of conformity, and regard the jurisdiction of the court to grant the discharge as dependent upon the exact conformity of the proceedings to *every* requirement of the act, and places the responsibility therefor upon the bankrupt. The case of the text is regarded as more in conformity to the true construction of the act. See Bump on Bankruptcy, 6th ed., 242.

the purpose of which is to obtain a reversal of an order of that court, granting a discharge to Billings, as a bankrupt.

A motion is made by the counsel of Billings to dismiss the writ of error, on the ground that the question at issue cannot be reviewed in this court on such writ, and also that it is an order which is not subject to review by an appellate tribunal in any mode.

The points here suggested must be determined mainly by a consideration of Sections 2 and 8 of the Bankrupt Law. The latter section says, that "appeals may be taken from the District to the Circuit Courts in all cases in equity, and writs of error may be allowed to said Circuit Courts from said District Courts, in cases at law under the jurisdiction created by this act, when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with an allowance of a claim, may appeal from the decision of the District Court to the Circuit Court for the same district. But no appeal shall be allowed in any case from the District to the Circuit Court, unless it is claimed and notice given thereof to the Clerk of the District Court, to be entered with the record of the proceedings; and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from."

"No writ of error shall be allowed unless the party claiming it shall comply with the statutes regulating the granting of such writs."

Under this section, when the matter decided is of an equitable character, and is therefore one which is usually reviewed in the Federal Courts by appeal, it may be carried to the Circuit Court by that mode of transferring cases. When it is a question which by the system of Federal jurisprudence is treated as a question of law, as distinguished from equity or admiralty proceedings, it may be carried to the Circuit Court by writ of error, but in either case the debt or damages claimed must amount to more than five hundred dollars.

Is there any such debt or damages claimed in the question of the discharge of the bankrupt debtor?

The plaintiff in error, who contested this discharge, had previously proved his debt before the Register, in the usual manner. About that debt there was no contest or dispute, and it exceeded the sum of two thousand dollars. The validity of that debt constituted no part of the contest about the bankrupt's discharge, nor did its amount. In that contest no claim was made for that debt. None was necessary. It was already established. No question to be considered on the writ of error can arise in regard to that debt. On the other hand, the order of the court discharges the bankrupt from the debt which he owed to plaintiff. It released him from a legal obligation to the plaintiff of over two thousand dollars. The plaintiff's right to contest this discharge, and his interest in the question of the discharge, rested entirely on this debt.

The Acts of Congress conferring appellate jurisdiction on the Supreme Court, when limited by the amount, use language something different from that used in the Bankrupt Act. It is there said that judgments and decrees of the Circuit Courts may be re-examined in the Supreme Court, when *the matter in dispute* exceeds the sum or value of two thousand dollars. In construing that act it has been held that if the matter in dispute is capable of a moneyed valuation, the case is within the statute; otherwise not. And it has been decided that the right to guardianship of an infant owning large property was not capable of such valuation. *Barry* v. *Merein*, 5 Howard, 103. *Barny* v. *Kraft*, 2 Black., 704.

But it has also been decided that the right of a person held in slavery to his freedom, was of a moneyed value, and was sufficient to support a writ of error. *Lee* v. *Lee*, 8 Peters, 44.

In the case before us, if the bankrupt had been refused his discharge it would have been very much such a case as that of the slave's claim to freedom, if the statutes had been alike. But in the Bankrupt Act the right to review by appeal or writ of error depends not on the value "of the matter in dispute," but on the "amount of the debt or damages claimed." And

the question again recurs, is there any debt or damages claimed in the resistance to the bankrupt's discharge? The point is a very narrow one, and in the absence of any direct authority cited to me, with no opportunity for more extended examination, I will not at present express any opinion on it, as I can decide the present case without doing so.

An examination of the record brought up by the writ of error shows a bill of exceptions embodying all the testimony taken on hearing of the motion to grant the bankrupt his discharge.

I am very clear that such a record presents nothing which I can consider on a writ of error. I take it to be too well settled now to need citation of authorities, that by the common law and by the practice in the Federal courts, no question of facts can be re-examined on writ of error.

It may be necessary, to enable the court to see the principle of law that was decided, to make the facts to some extent a part of the record by bill of exceptions, but it is always the law decided that is subject to review, and not the facts. *Burr* v. *Des Moines Nav. Co.*, 1 Wallace, 102.

In the case before me there is nothing presented but questions of fact. Did the defendants make the alleged alterations? Were they important? Were they false? Were they made with fraudulent intent?

These questions require also a comparison of the weight to be attached to the statement of conflicting witnesses, of the credit to be given to the statement of the defendant, a consideration of the manner in which he testifies, and many other matters, all of which are the peculiar province of a jury or other tribunal sitting in place of a jury, and do not belong to the revisory court sitting to correct errors of law.

If there had been questions of law raised on the introduction of testimony, or otherwise, the case might be different, but none such were raised or decided, as shown on this record.

In this position of the record, what disposition shall here be made of the case? Ordinarily, the rule undoubtedly is that where a case is brought to an appellate court by

writ of error the judgment must be affirmed unless some error is shown, of which the revisory court can take cognizance; but to this rule there is an exception. See *Burr* v. *Des Moines Nav. Co.*, already referred to.

This leads me to an examination of the 2d Section of the Bankrupt Law, under which it is claimed this writ may be sustained. That section may well be said to be brief but comprehensive. It enacts that "the several Circuit Courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and except where special provision is otherwise made, may upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity."

It would be difficult to use language capable of conferring a more complete supervision over all the proceedings of the District Court in bankruptcy than this does. There is not only a general superintendence, but, lest that word might not include everything, there is a general jurisdiction conferred. This extends not only to all cases, but to all questions arising under the act. In other words, the Circuit Court may review the whole case and decide on it, or it may assume jurisdiction of any particular question arising in the progress of the case. The mode of exercising this jurisdiction is equally liberal. It may be by bill, petition, or other proper process. That is, by writ of error, or *certiorari*, or any other process by which a case can be transferred from an inferior to a superior court.

Under this comprehensive power I have no doubt that if the plaintiff in error considers himself aggrieved by the action of the District Court in granting the defendant a discharge, he has a right to be heard on that matter in the Circuit Court.

To hold otherwise would be to say that one of the most important questions which the District Court is called upon to decide, both as it affects the interest of the bankrupt and that of his creditors, is not under the superintendence, nor within the

jurisdiction of the Circuit Court. Such a decision would be in direct conflict with the language of this section, and still more with its spirit.

If, therefore, a writ of error were, in the language of this section, "a proper process" to bring up that question, I would still entertain the case, and decide it on its merits. But, I have already shown that for this purpose it is not a proper process.

As the record, however, exhibits a case which may be brought before this court by petition, or by some other appropriate proceeding, for hearing on its merits, I will not enter an order affirming the judgment of the District Court, for such an order might stand in the way of revision on the merits. But exercising the general powers of superintendence over the case which belong to this court, the writ of error will be dismissed at the plaintiff's cost, and he will be remitted to such other proceedings as he may think advisable under the 2d Section of the Bankrupt Law.

Gilmore & Anderson for plaintiff.

Rankin for defendant.

UNITED STATES DISTRICT COURT.—W. D. PENNSYLVANIA.

Under Section 14 of the Bankrupt Law, household and kitchen furniture and other articles and necessaries to the amount of five hundred dollars may be set apart.

The discretion of the assignee limited to the "other articles and necessaries." Rule for exercising such discretion laid down.

Property of the value of three hundred dollars exempted under the laws of the State; but such exemption cannot include the same species of property as are named in the Bankrupt Law.

The State exemption must be ascertained by the mode designated by the State Law.

In re MARTIN W. FEELY.

I, SAMUEL HARPER, one of the Registers of said court in bankruptcy, do hereby certify, that in the course of the proceedings

in said cause, before me, the following question arose and was stated and agreed to by the counsel for the opposing parties.

In his schedules, the bankrupt claimed exemptions as follows: Under the Bankrupt Act a burial lot in St. Mary's Cemetery, valued at forty dollars, and the wearing apparel of himself, his wife, and children, to the value of one hundred and sixty-seven dollars and fifty cents; and under the laws of the State of Pennsylvania, sundry articles, being the stock of trade of the bankrupt as a retail grocer, of the value of three hundred dollars.

The assignee, in his report to the court, set apart to the bankrupt the burial lot and clothing, and denied to him the property claimed as exempt by the State laws.

To this report, so far as it denied the latter named property, the bankrupt, through his counsel, has filed exceptions.

OPINION BY THE REGISTER.

The 14th Section of the Bankrupt Law contains the following provision:

"Provided, however, that there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the said assignee shall designate and set apart, having reference, in the amount, to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; and also the wearing apparel of such bankrupt, and that of his wife and children, and the uniform, arms, and equipments of any person who is or has been a soldier in the militia or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment or seizure, or levy on execution by the laws of the United States; and such other property, not included in the foregoing exceptions, as is exempted from levy and sale upon execution or other process or order of any court, by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding

that allowed by such State exemption laws in force in the year eighteen hundred and sixty-four.

The true construction of this clause will allow the bankrupt the following exemptions, without qualification, viz.:

First. Necessary household and kitchen furniture to an amount not exceeding five hundred dollars.

Second. Wearing apparel of the bankrupt, his wife, and children.

Third. Uniforms, arms, and equipments, if bankrupt has been or is in the military service.

Fourth. Other property exempt by the laws of the United States; and

Fifth. Property exempt by State laws of different species from that already specified.

In addition to the foregoing it is the duty of the assignee, in the exercise of a sound legal discretion, taking into consideration "the family, condition, and circumstances of the bankrupt," to set apart other articles and necessaries, but so that, with the household furniture, the amount shall not exceed the sum of five hundred dollars. In considering the "family," the assignee must have regard to the number composing it; in inquiring after the "condition," he must ascertain the social status, and whether ill health prevails or not; and in regard to the "circumstances," he must inquire how the bankrupt is employed, what his income is; whether any—and if any, how many—of the family earn their own living, and whether they contribute to the support of the others; and also how much and what property the bankrupt is entitled to under the State laws.

It has been decided so frequently in other judicial districts, that the exemption under State laws is in addition to that allowed by the Bankrupt Law, whether the State laws exempt specifically, or allow the debtor to select, that I need not state the reasons why such an allowance should be made. But I am clear in the opinion, that the language of the clause relating to the State exemption materially qualifies the clause itself. The words "other" and "not included in the foregoing excep-

tions," properly construed, must deny to the bankrupt the right to claim household and kitchen furniture, wearing apparel, and the uniform, arms, and equipments of a soldier as exempt under the laws of the State, because such property is by name included in the preceding exceptions. If such be not the proper construction, those words can have no possible meaning, for without them the clause would be complete thus, "and such property as is excepted from levy and sale upon execution or other process, etc." Whilst a bankrupt is entitled to three hundred dollars worth of property, as exempt by the laws of the State of Pennsylvania, the peculiar construction of the clause under consideration requires him to make his claim upon other property than that specifically mentioned in the former part of Section 14. In the case of a bankrupt who has one thousand dollars worth of household furniture, and who has claimed five hundred dollars of it under the 14th Section, he cannot, under the latter clause of that section, claim to be allowed three hundred dollars of it under the State laws.

In this view the assignee cannot set apart to the bankrupt, under the State laws, any property specifically designated by the Bankrupt Law; but any property not so designated, he may; and, in setting apart such property, he must be governed by the amount allowed and the mode designated by the law of the State under which the exemption is claimed.

The exceptions to the assignee's report are sustained, and the exemption, as claimed by the bankrupt, allowed.

And the said parties requested that the same should be certified to the judge, for his opinion thereon.

Dated at Pittsburg, the 19th day of March, A. D. 1868.

SAMUEL HARPER,
Register in Bankruptcy.

MCCANDLESS, J.—The decision of the Register is affirmed.*

* *In re* Stevens, 5 N. B. R., 298. *In re* Welch, 5 N. B. R., 348. *In re* Ira Hay, 7 N. B. R., 344.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where one Coit, a creditor, opposed the discharge of bankrupts in a specification of twenty subdivisions, charging false swearing by the bankrupts on material matters before the Register, and concealment of assets, none of which allegations were sustained,

Held, that the discharge be granted, and a decree entered that bankrupts recover from the creditor the costs, to be taxed, of resisting the opposition of their discharge.

In re EDWARD ROBINSON AND ENOCH CHAMBERLAIN.

BLATCHFORD, J.—The first specification in this case is to the effect that both of the bankrupts, on their examinations before the Register, in this case, willfully swore falsely in regard to material facts concerning their estate and debts. Under this specification there are twenty subdivisions, fourteen of which specify instances of alleged false swearing by the bankrupt Robinson, and six of which specify instances of alleged false swearing by the bankrupt Chamberlain.

There is nothing material in any of these matters. They relate to transactions between the bankrupts and William A. Coit, the opposing creditor, in 1865, and principally to the manner in which certain indebtedness, then created on the part of the bankrupts to Coit, arose. That indebtedness was paid, and is no longer in existence.

On the facts, if they were material, I am satisfied, on the evidence, that the version given by the bankrupts is the true one. The examination of the bankrupts and other witnesses, was pursued by the creditor with an evident malice towards the bankrupts, and in a spirit of recklessness little befitting a judicial investigation, but quite consistent with the character of a money-lender who exacted from the bankrupts the sum of three hundred and fifty dollars for the loan of twenty-eight thousand dollars for four days, being at the rate of over one hundred and thirteen per cent. per annum. The manner, too, in which the creditor manipulated and procured some of the testimony put in on his part, savors very much of a criminal offense. The principal witness on whom the creditor relies to sustain his account of the transactions covered by the first

specification, does not present himself in a favorable light, inasmuch as it appears that he received compensation as an individual, for lending the money of the bank of which he was president—as grave an offense as can be committed by any one in a position of trust. As to Coit, his entire testimony shows him to be wholly unworthy of credit.

As to the second specification—that the bankrupts have concealed and refused to account for thirty-four thousand dollars of quartermaster's certificates or government vouchers, there is no testimony to sustain it, and the allegation is wholly disproved.

The third specification—that the bankrupts have willfully sworn falsely in the affidavit to the schedule of assets attached to their petition, by not including therein the said thirty-four thousand dollars of quartermaster's certificates, or the proceeds thereof, is not sustained, inasmuch as it is shown that they had no such property at the time.

The fourth specification—that the bankrupts have concealed their books and writings relating to their estate and effects, is unsupported.

The fifth specification—that the bankrupt Chamberlain has concealed an interest in a house and lot in Twenty-third street, in New York, is not sustained.

The sixth specification alleges that the bankrupt, Chamberlain willfully swore falsely in his affidavit to the schedule of assets attached to his petition, in not including therein the said house and lot in Twenty-third street. The conclusion as to the fifth specification disposes of this branch of the sixth. The sixth specification also avers that the bankrupt Chamberlain willfully swore falsely in said affidavit, in not setting forth therein a claim against one Morris. The evidence is that no such claim existed.

The seventh specification, in relation to the concealment by the bankrupt Chamberlain of books and writings, is not sustained.

Discharges will be granted to both of the bankrupts when the Register shall have certified conformity, and a decree will

be entered that the bankrupts recover from the opposing creditor the cost of resisting the opposition to their discharge, to be taxed.

G. A. Seixas, for the bankrupt.
J. S. L. Cummins, for the creditor.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where counsel representing creditors at the first meeting of creditors offered a resolution, that the court be requested to make an order authorizing the assignee to compromise and compound certain debts due the *bankrupt's* estate, by and with the consent of a committee of three creditors therein named, which resolution was voted for by all save two creditors, *Held*, that the said order is not warranted by any provision of the act, or by General Order 17.

In re H. E. DIBBLEE *et al.*, *Involuntary Bankrupts.*

I, THE undersigned, one of the Registers in Bankruptcy, do hereby certify to this Honorable Court that at the first meeting of creditors in the above entitled case, it was represented by Mr. Charles H. Smith, of counsel for a large number of the creditors, that there were very many small debts due the bankrupts, which were of doubtful collectibility, and that the interest of the creditors would in all probability require that many of them should be compounded and compromised. That as the trouble, delay, and expense, applying to the court to obtain leave so to compound or compromise, would be considerable, he moved the following resolution:

"That this court be requested to make an order that the assignee in this case be authorized and empowered to compromise any and all doubtful debts due to said bankrupts, by and with the consent and approbation of Effingham Townsend, William Lattimer, and Reese M. Obesteuffer, as a committee of creditors."

This resolution was voted for by all the creditors present save two. Whereupon, I do hereby certify the same to this Honorable Court for its action in the premises. I also submit

an affidavit made by the assignee. Under the requirements of the 19th Rule of this Honorable Court, I respectfully submit, that as no provision is made in the act for such an order as is hereby asked for, I beg to call the attention of the court to the provisions of Section 43, which contemplates a practice similar to the one here sought to be inaugurated. No proceedings have yet been had under this section before now; parties have been embarrassed by the omission in the Form No. 63 of the words "or as the assignee in bankruptcy would have done had not this resolution been passed," which are contained in the section, although it is clearly an inadvertence; and as the words of the act must govern, the omission does not seem as of much importance. Still, some have feared that proceedings thereunder might be questioned. Objections of this character have, I think, deterred parties from availing themselves of the provisions of this section, and thus appointing a trustee who (acting under a committee of creditors) might compromise and compound debts due to the bankrupt, without the expense and trouble of a special application to the court.

Respectfully submitted,

I. T. WILLIAMS,

Register in Bankruptcy.

BLATCHFORD, J.—I do not think that the order asked for is warranted by the provisions of Section 43 or by any other section of the act, or by General Order No. 17.

The Clerk will certify this decision to the Register, Isaiah T. Williams, Esq.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Attorneys for bankrupt applied to the Register for an order for the payment by the assignee, out of the assets, of a sworn bill of items of disbursements by them, of one hundred and thirty-seven dollars and sixty cents, on account of clerk's, register's, and marshal's fees, for printing in the case, to which the assignee objected that the bankrupt had paid his said attorneys five hundred dollars for their services in the case, which was

intended and fully sufficient to cover all expenses. The register certified the question of payment of the bill to the court.

Held, that the proper way to bring the matter before the court was by petition, either by the assignee or bankrupt's attorneys, and reference would be ordered for taking testimony.

In re MYRON ROSENBERG.

I, ONE of the Registers in Bankruptcy, do hereby certify to this Honorable Court that an application was made to me on the part of the attorneys for the bankrupt, to allow and order to be paid out of the funds in the hands of the assignee the sum of one hundred and thirty-seven dollars and sixty cents upon a bill of items, and an affidavit that such items had been disbursed by said attorneys for register's, clerk's, and marshal's fees for printing in these proceedings. The assignee appeared and opposed the allowance of the claim, setting forth and stating that seven days before the filing of the bankrupt's petition said bankrupt had paid to his said solicitors the sum of two hundred and fifty dollars on account of their services in said bankruptcy proceedings, and that on the day the bankrupt filed his said petition he had paid his said solicitors the further sum of two hundred and fifty dollars on account of the same services, claiming that said sum of five hundred dollars was sufficient compensation for the said services and disbursements. The question as to the right of the said bankrupts so to appropriate their funds, or as to where said bankrupts obtained said funds, or whether such funds were a legitimate part of the estate, that ought of right to come into his hands as assignee, was not reviewed or argued by the parties. The case as it presented itself to me for decision was, whether the sum of five hundred dollars, paid by the bankrupt to his solicitors, was a sum sufficient to cover the disbursements for officers' fees as well as for their own services rendered, and to be rendered, for said bankrupts, in and about their proceedings in bankruptcy. My doubt was whether I was authorized to take testimony as to the value of the said services, or determine the question from my own knowledge of the services of the solicitors in this case as it appears before me, or whether it was a question which the court alone has the power to dispose of.

Under the provisions of Section 6 of the act; I beg to submit the matter, and pray instructions from this Honorable Court.

Respectfully submitted,

I. T. WILLIAMS,
Register.

BLATCHFORD, J.—The matter should be brought before the court by petition, either on the part of the attorneys for the bankrupt or of the assignee, and it will then be referred to the Register to take testimony thereon.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

The Bankruptcy Court has full power to order the sale of encumbered assets in such manner as it chooses to direct.

Where assignee had commenced suit in the United States District Court against lien-holders, the Bankruptcy Court ordered the sale jointly by the assignee and the referee, of certain mortgaged property, and the deposit of proceeds in the treasury of the court to await the determination of the suit against the said lien-holders.

In re THE COLUMBIAN METAL WORKS.

BLATCHFORD, J.—In so far as Strauss, Bianchi & Co. have a lien by mortgage, judgment, or decree, on any real or personal property of the bankrupts, there can be no doubt of the power of this court, under the 20th Section of the Bankruptcy Act, to sell such property in such manner as it chooses to direct. The property has passed to the assignee in bankruptcy, subject, at most, to the lien.

In view of the suit instituted in this court by the assignee in bankruptcy, against Strauss, Bianchi & Co., I think that the proceeds of any sale on the judgment or decree recovered on the mortgage, ought not to be allowed to be applied thereon until the determination of the suit. At the same time the property claimed to be covered by the mortgage, and embraced in the judgment or decree of foreclosure, ought to be sold at once, in such manner as to produce the largest possible amount, for the benefit of whoever may be entitled to it. To that end, an order will be entered, permitting and directing the sale at auc-

tion, by the referee and the assignee in bankruptcy, jointly, of so much of the property of the bankrupts as is claimed by Strauss, Bianchi & Co. to be covered by the mortgage and embraced in the judgment or decree; so much thereof as is claimed by the assignee in bankruptcy not to be covered by the mortgage or embraced in the judgment or decree, by the terms thereof, to be sold separately from the residue, and a separate report of the sale price thereof to be made. The letters patent, owned by the bankrupts, and claimed to be pledged to Strauss, Bianchi & Co., to secure the debt due to them, will, under the authority of the said 20th Section, be sold jointly by the assignee in bankruptcy and by Strauss, Bianchi & Co., at auction, at the same time and place, and a separate report will be made of the sale price thereof: provision will be made for assignment of the letters patent by the vendors. The net proceeds of the above-named sales will be brought into this court, with a view to their being deposited on interest in The United States Trust Company, to await the determination of the said suit against Strauss, Bianchi & Co. The deductions to arrive at net proceeds will not include the fees of the referee or of the assignee for their services, or any expenses, fees, or costs, except those properly attending the sales; namely, printing, advertising and auctioneer's fees, and minor disbursements, to be enumerated by items in the report of sale. The fees of the referee and assignee will be adjusted afterwards by this court on proper application. The assignee will also sell at auction, at the same time and place, all property now in his possession, on the premises formerly occupied by the bankrupts, which is not embraced in the other sales above authorized and directed.

The details of the necessary order, if not agreed to by the parties, will be presented for settlement. The injunction heretofore issued will be modified by the order, in so far as may be necessary to allow the foregoing sales to be made.*

* *In re* Stewart, 1 N. B. R., 485, *octavo*. *In re* Barrow *et al.*, 1 N. B. R., 481, *octavo*. *In re* McClellan, 1 N. B. R., 389, *octavo*. *In re* Florida and Alabama Railroad, 1 N. B. R. 100 *quarto*, 500 *octavo*. *In re* Salmons, 2 N. B. R., 56, *octavo*. Foster *v.* Ames, 2 N. B. R., 455, *octavo*. *In re* Rhodes, 17 Pitts. L. J., 99.

UNITED STATES DISTRICT COURT—W. D. TEXAS.

1. Assignee has no authority to make specific charges for making and setting aside certificate of exempted property; drafting acceptance and notice of appointment for publication; drafting petition for sale of property, or drafting application for order of compromise. For such acts and services the court may allow reasonable compensation in its discretion, and allows ten dollars therefor.
2. A charge of court fees in drafting an order of compromise is correct, if fees were actually paid.
3. A charge of eight dollars for one day's service in preparing advertisements is disallowed as unauthorized. A fee of three dollars allowed.
4. A charge of seven dollars for one day's service by assignee in ascertaining value of property, allowed.
5. Charge of five dollars for writing and delivering deed, disallowed as improper.
6. An assignee has a right to seek professional advice and to employ counsel in necessary and proper cases. Charge of seventy-five dollars for counsel fees in simply compromising an inconsiderable debt with a lien creditor, under an order of court, questioned and suspended. Referee ordered to take testimony.
7. Assignee can only properly charge commission on the amount of debt canceled by compromise with a lien-holder.

In re J. W. Davenport.

Duval, D. J.—The following charges made by the assignee in this case, J. K. Williams, have been brought before me for revision, under exceptions taken by C. L. Dawson, as administrator, etc., a creditor of said bankrupt's estate; viz.:

1. Making out and setting aside certificate of exempted property	$ 5 00
2. Drafting acceptance and notice of appointment for publication	8 00
3. Drafting petition for sale of property	5 00
4. Drafting application for order of compromise	5 00
5. Court fees in drafting order of compromise	3 00
7. One day's service in preparing advertisements for sale in newspaper and handbills	8 00
9. One day's service in ascertaining value of property and fixing compromise	7 00
10. Writing and delivering deed	5 00
11. To my attorney, S. T. Newton, for services and counsel rendered in making compromise and settlement of said estate	75 00
12. My percentage on whole amount of said debt and interest, $1,662.60	66 56

The debt due Dawson, as administrator, etc., amounted to sixteen hundred and sixty-two dollars and sixty cents, secured by judgment thereon, with a credit of seven hundred dollars on the same. The only money in the hands of the assignee was that arising from the lien property, except ten dollars received for a lot in Tyler.

Nos. 1, 2, 3, and 4. I see nothing in the law to authorize the assignee to make these charges. They refer to acts done, for which the court may, in its discretion, allow a reasonable compensation to the assignee, as a part of the general service rendered by him in the case, but they furnish no basis for the specific charges made. They are, therefore, disallowed, and in their place ten dollars is allowed as a sufficient compensation for the services charged for in the above items.

Item 5.—This charge is correct, if the money was paid to the Register or any other officer of the court.

Item 7.—This charge is not authorized by law. For the service to which it refers, I think three dollars would be ample compensation, and this much and no more is allowed.

Item 9.—The charge of seven dollars embraced in this item is reasonable enough, if the time was actually employed for the purpose, as charged.

Item 10.—Unauthorized and improper. The purchaser should write his own deed, or cause it to be done. The charge is disallowed.

Item 11.—In prosecuting or defending suits, the assignee has the right to employ counsel, and so I conceive he has in any matter where legal advice is really necessary to enable him to act for the interest of the estate or of creditors. But I should doubt greatly the necessity of employing a professional adviser in a case like the present, where the assignee is proceeding, under an order of the court, and with the law to guide him, to compound or compromise an inconsiderable debt with a lien creditor. It is that character of proceedings in which an assignee, of ordinary intelligence, would be able to act for himself, and would rarely need the aid of an attorney. I am at a loss to know what legal questions arose, in connection with the

compromise made in this case, that rendered it necessary for the assignee to have professional aid. In addition to this, it appears to me that the charge made is extravagant. At present, I shall neither allow nor disallow it, but will refer the matter to the Register, who will proceed as hereinafter directed.

ITEM 12.—The creditor excepts to this charge, because commission is computed on the sum of sixteen hundred and sixty-two dollars and sixty cents, when the whole proof of debt shows only that amount, less a credit of seven hundred dollars and interest. In my opinion the assignee could only rightfully charge commission on the amount of debt canceled, which amount not being given in the papers before me, I cannot say what it is. It cannot, however, be more than the amount of the debt proven up, viz.: nine hundred and sixty-two dollars and sixty cents. Moreover, while property, upon which a lien exists, should be held to pay all charges and expenses incurred in making the transfer to the beneficiary thereof, as well as a reasonable compensation to the assignee for services rendered therein, it should not be charged with anything more, nor for any expenses or fees incurred in the general business of the bankrupt's estate.

To this charge for commission, I therefore sustain the exception of the creditor, but allow it to the extent before stated.

In regard to the charge embraced in No. 11, Mr. Register Whitmore is hereby directed, without delay, to hear evidence both as to the necessity which existed for the employment of counsel by the assignee, and the propriety of the amount charged. To this end, the assignee himself, as well as the attorney, may be examined under oath, and such other evidence received as may be pertinent and proper. And thereupon, the said Register shall determine whether any charge for counsel fee be allowed, and if so, the amount thereof. His decision thereon, together with the evidence on which it is based, to be certified to me for revision, in case the creditor or assignee so desires.

UNITED STATES DISTRICT COURT—W. D. TEXAS.

On bill of expenses and charges rendered by an assignee,

Held, 1. Specific charges by an assignee are unauthorized for (1) Drafting certificate of exempted property: (2) Drafting petition for sale of property, and (3) Drafting acceptance of notice of appointment. A reasonable amount for the several acts done may be allowed in the compensation for general services of the assignee. Amount of five dollars allowed.

2. Charges for publishing notices of appointment, advertising, and posting hand-bills. Correct and allowed.
3. Charge of forty-two dollars for six days' services in collecting notes and accounts considered extravagant, though entitled to a reasonable amount. Suspended.
4. A charge for recording assignment is correct.
5. Three items for different days' services, at seven dollars per day; attending sale of land, traveling and examining titles. Suspended.
6. A charge of fourteen dollars for two day's services in examining papers, allowed, provided the services were actual and not constructive, and no charges shall have been for same time in other cases.
7. Charge for stationery, postage, etc., allowed.
8. Specific charges for one days' service in making out report, and another day's service in making application to court for order of sale, disallowed as unauthorized and excessive. As general services, seven dollars allowed for said acts.
9. Charge for services of auctioneer disallowed. Assignee must act as salesman, unless leave of court in necessary cases is previously obtained to employ an auctioneer.
10. Commission of five per cent. allowed.
11. Charge of twenty-five dollars counsel fee suspended.

Suspended items referred to Register to take testimony and to allow proper amounts in his discretion; if his decision is objected to, the testimony and objections to be certified for revision by the court.

In re P. A. Pegues.

T. H. Duval, D. J.—Certain creditors of the bankrupt, by their attorneys, Hays & White, filed their exceptions to the following account rendered by the assignee, J. K. Williams, Esq., and the said exceptions having been overruled by the Register, G. W. Whitmore, Esq., his action in the premises has been certified to me for revision:

1. Drafting certificate of exempted property	$5 00
2. Drafting petition for sale of property	5 00
3. Drafting acceptance of notice of appointment	5 00
4. Publishing notice of appointment	6 00
5. Advertising and posting hand-bills	1 50
6. Six days' service collecting notes and accounts	42 00
7. Recording assignment	1 00
8. Two days' service attending to sale of land	14 00
9. One day's service advertising land and papers	7 00

In re Pegues.

10. Two days' service, trip to Henderson to record assignment and examine titles	14 00
11. Two days' service examining papers	14 00
12. Stationery, postage, etc	1 50
13. One day making out report	7 00
14. One day, making application for order of court for sale	7 00
15. Services of auctioneer	2 00
16. Commission on three hundred and ninety-two dollars at five per cent	19 60
17. S. T. Newton, attorney's fee	25 00

The 1st, 2d, and 3d charges are not only extravagant, but they are not authorized by the law. The acts done by the assignee, however, and for which these charges were made, may be regarded as among the general services rendered by him, for which the court may make him a reasonable allowance. The exceptions to these items are therefore sustained, and in lieu thereof five dollars is allowed.

The 4th and 5th items are correct, and therefore allowed.

The 6th seems to me to be extravagant, if allowable at all. The bankrupt should have been required to deliver the notes and accounts into court, or to the assignee. But if the service was performed, as charged, a reasonable compensation should be allowed. Referred again to the Register.

The 7th item is correct. Exception, therefore, overruled.

The 8th, 9th, and 10th require explanations and evidence to justify them. Referred to Register again.

The matter embraced in the 11th item is also referred to the Register again. If the service, as charged for, was necessary, and actually performed in this particular case, and no other cases were charged for the same time, then it would be proper to allow it.

The 12th item is allowed.

The 13th and 14th are disallowed. These charges are not authorized by law, and they are excessive. For the services mentioned in both these items seven dollars is a sufficient compensation, and that much is hereby allowed.

The 15th is disallowed. The law contemplates that the assignee shall himself sell the property of the estate. There

may be cases in which it would be proper to employ an auctioneer, but the necessity for so doing should be first shown to the court, and leave obtained.

The 16th is correct, and therefore allowed.

The 17th needs explanation. The assignee does not state for what an attorney's fee is charged, and it would be difficult to tell what need he had for the services of one in the administration of this small estate. For this reason, and the views briefly mentioned by me touching a like charge in the case of J. W. Davenport, No. 164, the matter is again referred to the Register.

The 6th, 8th, 9th, 10th, 11th, and 17th charges are again referred to Mr. Register Whitmore, who is hereby instructed to hear any pertinent and proper evidence in regard to the services charged for in the several items, and their actual performance and necessity, and after so doing, to allow or disallow the said charges in whole or in part, as he may deem just; and should his decision thereon be objected to by the creditors or assignee, the same to be certified to me for revision, together with the evidence on which it is based.

UNITED STATES DISTRICT COURT—W. D. TEXAS

On revision of charges in the assignee's bill of costs, *Held*,

1. Charges for expenses of publishing notice of appointment, advertising sale of property, recording deed of assignment, stationery, etc., are proper. Exceptions overruled.
2. Charge for making deed of conveyance is unauthorized.
3. Charge for counsel fee of twenty-five dollars suspended.
4. Charges for specific acts, such as drafting notice and acceptance of appointment, petition for order of sale, setting aside certificate of exempted property, are unauthorized; but the acts may be compensated as for general services by reasonable allowance, in the discretion of the court.

Suspended items referred to Register to take testimony and decide, in his discretion, on their allowance in proper and reasonable amounts.

In re RILEY TULLEY.

T. H. DUVAL, D. J.—The only assets belonging to the estate of the bankrupt was a tract of three hundred and twenty acres

of land, upon which a lien existed in favor of W. M. Stover, executor of W. F. Palmer, deceased, for five hundred dollars and interest. The land was sold under order of the Bankrupt Court, and purchased by said executor for two hundred and forty-nine dollars.

In his report, the assignee, J. K. Williams, renders the following account, viz.:

1. By draft of notice and acceptance of appointment	$5 00
2. Setting aside certificate of exempted property	5 00
3. Petition for order of sale	5 00
4. Publishing notice of appointment	6 00
5. Advertising sale of property	1 50
6. Recording deed of assignment	1 25
7. 1 day's service selling real estate	7 00
8. Making out report	7 00
9. Stationery, etc.	1 00
10. Writing deed of conveyance	5 00
11. Attorney's fees	25 00
12. Commissions on $249 at 5 per cent	12 45
	$81 20

All the items in the account are excepted to by the creditor, the said Stover, except the 5th and 6th, but the exceptions having been overruled by the register, the case has been certified to me for revision.

As decided in the case of P. A. Pegues, bankrupt, No. 43, the charges Nos. 1, 2, and 3 are held to be unauthorized. I believe that five dollars would be sufficient for the services referred to in these three charges, and accordingly allow the same, and no more.

The 4th, 5th, 6th, 9th, and 12th items are correct, and the exceptions to them are hereby overruled.

The 7th and 8th items are disallowed. The law does not authorize these specific charges. For the services mentioned in both these items, I think seven dollars is a sufficient compensation, and the same is hereby allowed.

The 10th item is unauthorized by the law, and the exception thereto is sustained.

As to the 11th item, I am unable to understand for what

purpose the services of an attorney could possibly have been needed by the assignee in this case. Without the most satisfactory evidence going to show the necessity for legal aid on the part of the assignee, and the actual rendition of the services charged for, this item should not be allowed. The matter is hereby referred to Mr. Register Whitmore, who will at once proceed to hear testimony on the subject, and take such action thereupon as he may deem proper, subject to the revision of the court. If, as is claimed by the creditor, the assignee has already received thirty-one dollars from the bankrupt, this amount should be deducted from the assignee's account.

UNITED STATES DISTRICT COURT—W. D. TEXAS.

An unmarried man, a bankrupt, having orphan children bound to him under the apprentice laws of Texas, and keeping house, hiring servants, and conducting a household, claimed a homestead of one hundred acres, as head of a family, by the laws of Texas. The assignee set apart the same, but afterwards made a motion to have the award set aside as unauthorized.

Held, that the bankrupt was not entitled to such homestead as head of a family.

Amount thereof set aside, and fifty acres ordered to be set apart to him as a citizen, under the Texas laws, not to exceed in value five hundred dollars.

In re C. M. SUMMERS.

T. H. DUVAL, D. J.—The question presented in this case arises upon a notice made by John C. West, assignee, to have the homestead allowance of one hundred acres, which he had allotted to the bankrupt under a mistake as to the facts, set aside, and that the same be held subject to the claims of his creditors. The bankrupt was thereupon required to submit himself for examination touching this matter. In reply to interrogatories propounded to him, he states, under oath, that he has never been married. He declares further as follows: "I am the head of a family, and have kept house and owned slaves for years before they were set free, and still keeping house when I filed my petition. I have orphan children bound to me under the apprentice laws, by the County Court of Falls

county. I had, at the time of filing my petition, hired servants on my premises. I have and keep up all the usual appurtenances of a homestead, supplying provisions and conveniences for my servants, and carrying on my household matters, in all respects, as the head and support of a family, except that I have no wife. I am permanently settled, and regard myself as responsible for the maintenance and care of the orphan children above named. My claim for the exemption was made in good faith, and by the advice of my attorneys, after a fair statement of all the facts."

The bankrupt assumes that the above state of facts constitutes him the head of a family, and authorizes him to claim the constitutional homestead exemption. In this I think he is mistaken. Had the bankrupt adopted the orphan children spoken of by him, in the mode prescribed by the statutes of Texas, my conclusion would be different, but he seems only to have had them apprenticed to him. This apprenticeship did not invest the children with any right or interest in the estate of the bankrupt, or entitle him, as having "a family," to a homestead exemption, within the intent and meaning of the Constitution.

The constitutional provision is, that "the homestead of a family, not to exceed two hundred acres of land (not included in a town or city), or any town or city lot or lots, in value not to exceed two thousand dollars, should not be subject to forced sale for any debts hereafter contracted," etc. According to my understanding of this provision, and in so far as it has been construed and acted upon by the Supreme Court of this State, the right to a homestead resulting from the having "a family," depends either on the fact of marriage, or, in default of marriage, upon the charge and protection of others adopted as children, or of those who, by reason of kindred, have some interest in and claim to the premises of the person with whom they reside. An unmarried man may, from charity or other motives, take into his house and maintain any number of children not related to him in any way, and yet he would not, as I conceive, have such "a family" as was contemplated by

the Constitution, in order to entitle him or them to a homestead exemption.

The decisions of the Supreme Court of this State, in regard to the question as to what shall be considered a family, with respect to the colonization and immigration laws, do not, I think, apply to the constitutional homestead provision. The policy and objects of the two are widely different.

While it is my opinion, therefore, that the bankrupt, under the facts of this case, cannot claim a homestead under the constitutional provision, I see nothing to prevent him from doing so as a citizen or single man, by virtue of the Act of the 26th January, 1839, which is still in force, as has been decided in the Supreme Court in the case of *Cobb* v. *Coleman*, 14 Texas Reports.

This act provides, among other things, that from and after its passage, "there shall be reserved to every citizen or head of a family in this republic, free and independent of the power of a writ of *fieri facias*, or other execution issuing from any court of competent jurisdiction whatever, fifty acres of land, including his or her homestead, and improvements not exceeding five hundred dollars in value," etc.

The Constitution of the State made provision for heads of families, or rather as to the "homestead of a family," and as to them this Act of 1839 may be regarded as virtually repealed. But its other provisions remain intact and in full force.

While I do not think, therefore, that this bankrupt can properly claim the one hundred acres as being the "homestead of a family" under the Constitution, it is my opinion that he is entitled as a "citizen" of this State, to fifty acres, as secured by the Act of 1839.

The motion of the assignee is therefore sustained, and he is directed to set aside the exemption of one hundred acres heretofore allowed to the bankrupt, and to restrict the same to fifty acres, including his homestead and improvements, or so much thereof as will not exceed in value the sum of five hundred dollars.*

* A different conclusion has been reached under a similar provision in the courts of Georgia. See *post*,

In re Phelps v. A. B. & C. L. Clasen.

UNITED STATES CIRCUIT COURT—DISTRICT OF MINNESOTA.

1. A response to the rule to show cause in involuntary bankruptcy, which denies the acts of bankruptcy charged in the petition, and demands a trial by jury, is sufficient, without a formal answer to the petition.
2. It is to be doubted whether, on the trial of that issue, the validity of the petitioning creditor's debt can be made the subject of inquiry.
3. A promise to A, made on a new consideration, to pay the debt which he owes to B, is not within the statute of frauds.
4. It is not essential that the debt of the petitioning creditor should be *due* at the date of the alleged act of bankruptcy, to enable him to sustain proceedings against the bankrupt.
5. When persons distinctly named in an instrument of writing as parties of the second part, sign their names as witnesses, it is not for that reason an *ex parte agreement*, but both parties are bound as though they had signed as such.
6. The doctrine may be taken as established, that whether the instrument relied on be signed by one only, or by both parties to it, it does not exclude parol proof of a consideration for the signature of one of the parties, additional to, and differing from, the one which it recites, unless it appears that it was the intention of the parties to state in such instrument all the consideration for such signing.
7. When parties have attempted to put their agreement in writing on any particular subject, and have expressed any clear meaning, parol testimony cannot be received to contradict or vary that meaning.
8. Where they have used language which, when considered in the light of all the circumstances attending the transaction, is incapable of conveying any satisfactory meaning, parol testimony cannot be admitted, to state, in terms, what was the meaning intended.
9. But it is not inconsistent with either of these propositions, that parol proof may be received, of any or all the circumstances surrounding and accompanying the transaction, tending to show the relation of the parties to each other, and to the subject-matter of the contract, and the state or condition of that subject-matter, as bearing on the intention of the parties.
10. In construing a clause of a contract, by which, one partner selling his interest in the firm to the other, it is agreed that the sale is subject to the indebtedness of the old firm, it is admissible to show that there were no liens on the goods of the firm for such indebtedness; that the parties well knew this; that the value of this interest of the retiring partner was three times the money paid him, and recited in the instrument of sale as the consideration; and any other matter of this character, calculated to enlighten the court as to the true intent of the parties.
11. Such an instrument construed.

In re A. I. PHELPS *v.* A. B. & C. L. CLASEN.

MILLER, P. J.—This is a writ of error to the District Court, to bring here for review a judgment of that court refusing an order of bankruptcy prayed by plaintiff against defendants. The issue was tried by a jury, and the case is before this court

on the exceptions taken by plaintiff to certain orders of the court, and to the rulings of the court on the trial.

The first of these orders complained of, is the over-ruling of plaintiff's motion to declare defendants bankrupt, for want of an answer to his petition.

There is no formal answer to the petition of the creditor, and it is extremely doubtful if any answer is necessary. Section 40 of the Bankrupt Act directs, that on the filing of a petition, a rule shall issue to the defendant to show cause why he should not be declared a bankrupt. The response to this rule is not necessarily to be made by filing an answer to the petition.

The next section requires that on the return day of this rule, the court "shall proceed summarily to hear the allegations of the petitioner and the debtor," and that if at that time the debtor shall demand a jury in writing, the court shall order a trial by jury at the first term on which a jury shall be in attendance, "*to ascertain the facts of said alleged bankruptcy.*" In this case the debtor did file a written paper at the proper time, denying the act of bankruptcy charged, and demanding a trial by jury.

I am of opinion that this paper presents a proper response to this rule to show cause, and entitled the defendants to a jury trial. There was, therefore, no error in overruling the motion of the petitioner.

On the trial before the jury, the first point which was raised, and which the court held to control the verdict, was the existence of the debt claimed by plaintiff to be due from defendants to him.

It may be doubted, from the language of the statute above recited, whether the bankruptcy of the defendants—the only fact to be ascertained by the jury—might not exist and be found by their verdict, although the petitioning creditor had failed to prove his debt before them. This view seems to be supported by the fact that debts against the estate of the bankrupt are to be proved at another time, and in another mode. See Sections 22, 23, 24. If the debtor intended to deny that he owed the petitioning creditor debts to the amount of two hun-

dred dollars, he could have raised that question before going to the jury on the alleged act of bankruptcy. But as this question was not distinctly made in the District Court, and is not mentioned in the briefs of counsel, it is not decided here.

On the trial the plaintiff was introduced as a witness, and testified that he had formerly been a partner in the firms, Jennings & Phelps and Phelps & Clasen, the latter being successor to the former, and composed of himself and A. B. Clasen. That on the 1st day of April, 1867, he had sold his interest in the latter firm to the respondents. The witness was then shown an instrument of writing, which he said was a bill of sale from him to respondents, and that the goods in the store were delivered to them in pursuance of said bill of sale. This paper read as follows:

KNOW ALL MEN BY THESE PRESENTS: That I, A. I. Phelps, town of Cannon Falls, county of Goodhue, State of Minnesota, of the first part, for and in consideration of nine hundred and nine dollars and ninety cents ($909.90) in lawful currency of the United States to me in hand paid, at or before the ensealing of these presents by A. B. & C. L. Clasen, of the same place, parties of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey unto the said parties of the second part, their executors, administrators, and assigns, the one equal and undivided one-half interest in the goods, wares, and merchandise, debts due, and demands of whatsoever nature or name owned by and due the firm of Phelps & Clasen, as merchants, in said town of Cannon Falls. And it is further understood by the parties of the second part, that the above sale is made, subject to any indebtedness made by the purchase of any of beforementioned goods, wares, and merchandise, by Jennings & Phelps, and Phelps & Clasen, for which reference is made to an account of liabilities on the 1st day of April, 1867. To have and to hold the herein described property to the said A. B. & C. L. Clasen, their heirs and assigns forever.

In testimony whereof, I have hereunto set my hand and seal this 1st day of April, 1867.

A. L. PHELPS. [SEAL.]

Signed, sealed, and delivered in presence of
CHARLES L. CLASEN.
A. B. CLASEN.

[Five cent revenue stamp canceled.]

Counsel for plaintiff then proposed to prove by the witness that the defendants, in consideration of said sale, verbally promised that they would pay all the debts then owing by the two firms, Jennings & Phelps and Phelps & Clasen, and that they had failed to do this, in consequence of which plaintiff has been compelled to pay said debts, to the amount of two thousand and sixty-one dollars and thirty-seven cents, and asked witness several questions tending to show those facts. All these questions were objected to by defendant's counsel, and the objections sustained by the court on the ground that the paper called a bill of sale was the sole evidence of the contract between the parties, and could not be contradicted or varied by oral testimony. After the examination was closed the court instructed the jury that there was no evidence to sustain the issue on the part of the petitioning creditor, and that they must find for the defendants, which they did. These rulings of the court present the questions that I am now to consider.

The counsel for respondent also maintains that this testimony must be excluded, on the ground that, being a promise to pay the debt of another, it cannot be proved by parol testimony, because of the statute of frauds. But this being a promise to plaintiff, made on a new consideration, to pay the debt that he owed to a third party, is not within the statute, as has been repeatedly decided.

It is also contended that because the plaintiff had not paid the debt to the creditors of the firm of Phelps & Clasen, until after the principal act of bankruptcy alleged against defendants had been committed, they could not be declared bankrupts on his petition. The creditor who can file a petition for invol-

untary bankruptcy, is one whose debt is provable under the act. See Section 39. The first clause of Section 19 declares that all debts due and payable at the time of the adjudication of bankruptcy, and all debts then existing, but not payable until a future day, may be proved against the estate of the bankrupt. These provisions leave no doubt that the demand of the plaintiff, if a valid one, was sufficient to support the proceeding.

As regards the paper called a bill of sale, counsel for plaintiff claims that it is merely the *ex parte* instrument of the plaintiff, the main purpose of which was to transfer his interest in the partnership of Phelps & Clasen; that defendants signed it as witnesses, and not as parties, and that consequently parol proof of the verbal promise of the defendants to pay the debts of the firm, is not excluded by the recital of the money consideration mentioned in said instrument.

The defendant's counsel, on the other hand, maintain that it is a deed signed by both parties, and that no other contract or promise on the part of defendants can be proved than what may be found in that instrument.

Notwithstanding the sworn statement of plaintiff, that the defendants did not sign as parties, but as witnesses, I am of opinion that as the paper recites a contract between two parties, naming them, and refers to the intention of these parties in separate clauses, the persons mentioned as parties, and whose names are by themselves attached to the paper, are bound by all the obligations which it may establish against them, and are entitled to all the rights which it may confer on them, whether they understood themselves as signing as witnesses or as parties.

Though nearly all the cases in which it has been decided that parol proof may be received of the consideration of an instrument different from the one recited in it are founded on *ex parte* instruments, the principle is nowhere limited to that class of cases. On the contrary, the cases of *De Wolf* v. *Rabaud*, 1 Peters, 476; *Sweet* v. *Lee*, 3 Man. & Gr., 452; and *Clifford* v. *Turrell*, 1 Younge & Collyer's Chancery Cases, 138, are instances in which the instrument was signed by both

parties, and in which parol proof was allowed to sustain a cause of action founded on a consideration not mentioned in the instrument, and entirely different from the one which was mentioned.

The doctrine, therefore, may be taken as established, that whether the instrument relied on be signed by one only or by both parties to it, it does not exclude parol proof of a consideration for the signature of one of the parties, additional to, and differing from the one which it recites, where it does not appear that it was the intention of the parties to state in such instrument all the consideration for such signing.

If, therefore, there was no other reference in the bill of sale to the consideration for which plaintiff conveyed his interest in the old firm to the defendants, than the recital of the nine hundred and nine dollars, I should have no hesitation in admitting the parol proof offered by plaintiff.

But I am satisfied that the second clause in the instrument was intended by the parties to be a statement of their agreement in regard to the very matter which plaintiff desired to prove by parol. And I am of opinion: First, That where the parties have attempted to put their agreement in writing, on any particular subject, and have expressed any clear meaning, parol testimony cannot be received to contradict or vary that meaning; and Second, That where they have used language which, when viewed in the light of all the circumstances attending the transaction, is incapable of conveying any satisfactory meaning, parol testimony cannot be admitted to state in terms what was the meaning intended.

But it is not inconsistent with either of these propositions, that parol proof may be given of any or all the circumstances and facts surrounding and accompanying the transaction, showing the relation of the parties to each other, their knowledge of the subject-matter of the contract, the state or condition of that subject-matter, as bearing on the intention of the parties, which may suggest a meaning where none was apparent before, or which may show what construction shall be placed upon the language used, which is susceptible of more than one interpre-

tation. See *Bradley* v. *Steam Packet Company*, 13 Peters, 89; *Mauran* v. *Bullus*, 16 Peters, 528; *De Wolf* v. *Rabaud*, 1 Peters, 476; *Blossom* v. *Griffin*, 1 Kernan, 549.

With these principles in our mind applicable to the matter in hand, we proceed to examine the instrument to be construed. The clause to which I am referred, reads thus: "And it is further understood by the parties of the second part, that the above sale is made subject to any indebtedness, made by the purchase of any of before-mentioned goods, wares, and merchandise, by Jennings & Phelps and Phelps & Clasen, for which reference is made to an account of liabilities on the 1st day of April, 1867."

It is maintained by the counsel for plaintiff, that the meaning of this clause is, that the vendees in that sale were to pay certain debts of the two firms mentioned, which were contracted for the merchandise they were then buying, and which were set forth in a list made on the 1st of April. But if we confine our attention to this clause of the instrument, it cannot be said that there is any promise by the parties of the second part, that they would pay those debts. And if any personal obligation to do this is assumed by them, it can only be seen by a reference to the whole instrument, and to certain extrinsic facts connected with the transaction, to be shown by parol testimony.

Counsel for defendants contend that the intention of the parties was, that in the purchase of the goods, the vendees took them subject or liable to any lien on them by mortgage or otherwise, which existed at the time of the sale, for debts created by their original purchase; and they further say that if this was not the true meaning, then the clause is without sense, and fully within the rule on that subject above laid down.

The language of this clause does not, by its *terms*, convey the meaning claimed by counsel. There is no mention of any lien on the goods. The law does not give a lien for goods sold and delivered, and there is not, therefore, any implication that the debts mentioned, carried a lien with them. The sale is said to be made subject to *any* indebtedness contracted for the

purchase of these goods, and not merely to such indebtedness as might be a lien on them. The indebtedness intended is to be found in an account of liabilities of the firm, of the same date with the instrument we are construing. A reference, therefore, to this account is necessary to show what indebtedness is meant. If, however, it can be shown that there were liens on the goods by mortgage or otherwise, for the class of indebtedness described, it would not be unreasonable to construe this clause as counsel for defendants contend. On the other hand, if it can be shown that there were no such liens, and that both the contracting parties knew there were none, it would be very clear that they did not mean that.

One of the questions asked by plaintiff's counsel, and overruled by the court, was whether there were any such liens. And the witness having stated that there were none, this was excluded from the jury, and held by the court to be inadmissible. This fact, in direct reference to the condition of the property which was the subject of the sale, which must have been well-known to both the contracting parties, comes within all the decisions on the subject, as proper to elucidate the meaning of the language used by them; and being proved, shows clearly that they did not mean what is claimed by counsel for defendants.

We are next to consider whether all endeavors to ascertain the true meaning is hopeless, or whether, considered in the light of all the circumstances attending the parties, and the matters of the contract, taking this clause in its relation to those facts, and to the remainder of the instrument, we can deduce a reasonable and sensible meaning for this part of the agreement.

The parties were contracting with each other in reference to a stock of goods and debts due them, in which they were partners, and in reference, it is equally clear, to certain debts of that partnership, for which plaintiff and one of the defendants were jointly liable. In selling plaintiff's interest to his then partner and the other defendant, something was made subject to the indebtedness of the firm which he was then leaving.

What was so subjected, and what was meant by its being

made subject? The subject matter of the contract was the sale by plaintiff of *all* his interest in that partnership to defendants. This appears from the instrument itself. The value of that interest nowhere appears in the paper, but if it can throw light on any clause of the contract, it is a matter which can be proved by parol, for it neither contradicts nor varies the terms of the instrument. It is claimed by defendants that the nine hundred and nine dollars mentioned in bill of sale, was the only consideration that they paid, or agreed to pay, for the interest of plaintiff. It is claimed by plaintiff that a large part of the consideration was the assumption by the vendees of the debts of the old partnership, and that such is the meaning of the clause in question. If the interest sold by plaintiff to defendants was worth three thousand dollars, as claimed by counsel, and this can be proved, it is unreasonable to suppose that he sold it for nine hundred and nine dollars alone. If defendants give the fair value of the interest for it, what more reasonable than that they made up the difference above the nine hundred dollars, by assuming the debts of the old firm, for which one of them was already liable.

Now, in the light of all these circumstances, what is meant by "the sale being made subject to the indebtedness of" the two firms of Jennings & Phelps and Phelps & Clasen?

Without further verbal criticism, I may say, that if it were necessary to sustain plaintiff's claim, I would hold that it means a promise on the part of defendants to pay all such debts of the two firms as were created by the purchase of any of the goods conveyed by the bill of sale, and which should be found in the account of liabilities taken on the day of sale. The fact that this account of liabilities was taken at the same time that the sale was made and is referred to therein is significant in this direction.

But it is not necessary to go quite so far. It is sufficient to interpret the clause to mean, that defendants *take the goods charged in their hands by that contract with a liability to pay the debts mentioned out of those goods.* And that for this appropriation of the proceeds of those goods so far as was

necessary, defendants are responsible to plaintiff, who was interested in the payment of those debts. This I think is a fair and reasonable construction of the contract signed by both parties; consistent with the language used, and with all the surrounding circumstances.

Having disposed of the goods without applying them to this purpose, and having committed the acts of fraud and bankruptcy charged in the petition, so that plaintiff was compelled to pay those debts, he had a right of action against them for the amount so paid by him.

These views of the introduction of parol testimony are well sustained, in addition to the authorities already cited, by the note of Prof. Parsons, at page 555, Volume II., 5th edition of his work on Contracts, where he gives a philosophical statement of some of the principles concerning the admissibility of parol testimony to affect written contracts.

The judgment of the District Court is therefore reversed, and the case remanded to that court, with directions to set aside the verdict and grant a new trial, in consonance with this opinion.*

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where counsel representing certain creditors objected to the votes being received for choice of assignee, from certain other creditors, alleging the same to have been procured by collusion of the bankrupt, and offering testimony in support, the Register declined to hear such proof,

* As to the proper answer to a rule to show cause why respondent should not be adjudged bankrupt, see *In re* Sunderland, 3 N. B. R., ▪ *octavo*, if petition indefinite. If insufficient in law, *In re* Melick, 4 N. B. R., 26 *quarto*, 21 *octavo*. *In re* Gebhardt, 3 N. B. R., 26 *quarto*, 14 *octavo*. Demand for jury trial must be filed on return day, *Idem*, 8 N. B. R., 44; *Id.*, 142, 385; when need be sworn to, 9 N. B. R., 83. The debt of the petitioning creditor need not be due. It is sufficient that it is a debt *provable* in bankruptcy, *Lunn et al.* v. *Smith*, 4 N. B. R., 12 *quarto*, ▬ *octavo*. *In re* Ouinette, 3 N. B. R., 140 *quarto*, ▬ *octavo*. The debt must exist at the time of filing the petition. Where a petition was founded on a debt due by a minor, and he failed to affirm the debt, previous to filing the petition against him; *held*, the adjudication was void. *In re* Derby, 8 N. B. R., 106.

In re Noble.

Held, the action of the Register was right. In submitting the question of the assignee's approval, the Register, by standing rule, must report, for the information of the court, whatever reasons exist and are known to him against such approval.

In re GEORGE W. NOBLE.

I, THE undersigned, one of the Registers in Bankruptcy, do hereby certify to this Honorable Court, that at the first meeting of creditors in these proceedings, while the vote for the election of an assignee was proceeding, the counsel for a portion of the creditors, Mr. Seixas, objected to the receiving of the votes of several of the creditors, represented by Mr. Carter, of counsel, offering to prove that their votes had been influenced and procured by the bankrupt, acting in his own interest, and that such votes were therefore collusive and fraudulent. Mr. Carter opposing, I declined to hear such proof, holding that I had no power, without the special order of the court, to inquire into the right of creditors to vote, save for the purpose of postponing the proof of claims until an assignee is chosen, pursuant to the provisions of the 23d Section of the act. The objecting counsel, not being satisfied with this decision, desires it to be certified to the court.

Pursuant to the 19th Rule of this court, I beg to submit that the act does not expressly require the Register to take such proceeding. As a matter of practice it would involve the parties, in some cases, in very great labor, and put them to much expense in taking testimony of the character here offered. Besides, it would often greatly postpone the choice of an assignee, and that, perhaps, to the detriment of the assets of the bankrupt. Unless in case of strong probability, made out and sustained by affidavits, it would seem that such labor and expense ought not to be imposed. Such a charge is easily made, and is with difficulty rebutted. It is already a standing rule that in case the Register shall be satisfied that any reason exists why an assignee elected or appointed should not be approved by the judge, he shall state such reason fully in submitting the question for approval. I think this a sufficient safeguard against evils of this character, and all that is at present neces-

sary. Should future developments seem to require something more stringent, it can be done by a general rule of the court.

Respectfully submitted,

I. T. WILLIAMS, *Register.*

BLATCHFORD, J.—The decision of the Register was correct, and his views, above expressed, are approved.*

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Bankrupt held his store on a verbal lease, terminating May 1, 1869, for sixteen hundred dollars per annum and taxes. On December 26, 1868, he surrendered his stock of goods to the Register, and delivered to him the key of his store. The Register turned the same over to the assignee, March 2, 1869, and on the 25th of March the goods therein were sold by the assignee's order. On the 1st of February, the landlord executed another lease to a stove company. Toward the end of April applications were made to the assignee for the key, and he immediately delivered it up. The store had been unoccupied by the assignee after the 1st of April, and he was ignorant of the owner and of the second lease. The landlord claimed rent from December 26, 1868, to February 1, 1869, and the Stove Company claimed rent at the rate of two thousand dollars per annum from February 1, 1869, to May 1, 1869.

Held, the assignee should only pay rent at the rate of sixteen hundred dollars per annum to April 1, 1869.

In re TRUMAN MERRIFIELD.

STATEMENT.

THE bankrupt filed his petition December 26th, 1868, at which time he had a stock of goods at No. 230 Water street, which premises he occupied under a verbal lease from B. Stephens and others from May 1st, 1868, to May 1st, 1869, at a rent of sixteen hundred dollars a year, and the taxes on the property.

Upon filing his petition, the bankrupt surrendered his prop-

* Where there are doubts as to the validity of debts, or the right of the party offering to prove them, then the Register may postpone the proof of *such* debts until after the election of an assignee. *In re* Stevens, 4 N. B. R., 122, *quarto*, *octavo*. *In re* Jaycox & Green, 7 N. B. R., 303. *In re* Lake Superior C. R. & I. Co., 7 N. B. R., 376. When a new election will be ordered, Haas & Samson, 8 N. B. R., 189. *In re* John & Martin Pfroonm, 8 N. B. R., 357.

erty to the Register, John Fitch, and delivered to him the key of said store, and the Register thereupon placed a man in charge of the property.

After the appointment of an assignee on the 27th day of February, 1869, the person in charge of the stock of goods, by direction of the Register, delivered the key to the assignee (March 2d, 1869), who sent the same to an auctioneer, with directions to take possession of and sell the said stock of goods. The said auctioneer immediately proceeded to take an inventory of the stock, and the same was sold on the 25th day of March, 1869, and the goods immediately afterwards were removed. The possession of the premises could have been delivered to anybody who required the same on or at any time after the 1st of April; but it was not until the last week in April that application was made to the assignee for the keys of the place, when they were immediately delivered. The store had been unoccupied by the assignee since the 1st of April. The assignee was not, at the time of his appointment, nor until the end of April, aware who was the landlord of the building, or entitled to the rent. The owners of the building made a written lease, on the 1st of February, to the Barstow Stove Company, to rent the said premises, No. 230 Water street, to them at the rate of two thousand dollars a year, of which arrangement the assignee had no knowledge, and no application was made by the Barstow Stove Company to him for the possession of the said premises until the last week of April, when they were immediately delivered. The owners, B. Stephens and others, claim to be paid by the assignee the rent of said premises, from the 26th day of December, 1868, to the 1st of February, 1869, at the rate of sixteen hundred dollars a year, amounting to one hundred and fifty-five dollars and fifty-five cents. The Barstow Stove Company claim to be paid by the assignee the full rent of the said premises for the three months of February, March, and April, at the rate of two thousand dollars a year, or five hundred dollars.

It is hereby stipulated and agreed that the foregoing state-

ment of facts may be submitted to the court for its decision as to the liability of the assignee to pay the rents claimed.

E. M. Willett, for the claimants.

C. W. Bangs, attorney for John Sedgwick, assignee, etc.

BLATCHFORD, J.—I think that the assignee ought to pay rent for the store from December 26th, 1868, to April 1st, 1869, at the rate of sixteen hundred dollars per annum, and for no other period, at any rate.

UNITED STATES DISTRICT COURT.—S. D. NEW YORK.

Where counsel of creditor put questions to bankrupt upon his examination, touching property of his wife, and his own acts in relation thereto, bankrupt objected that the questions related to matters existing and transpiring prior to the time when the creditor's debt was contracted, and declined to answer unless compelled.

***Held*, That the questions were proper, and bankrupt should answer.**

In re DANIEL H. CRAIG.

I, ODLE CLOSE, one of the Registers of said court in Bankruptcy, do hereby certify, that in the course of the proceedings in said cause before me, the following questions arose, and were stated and agreed to by the counsel for the opposing parties, to wit:

The following is a summary of the evidence upon the point to be submitted to the court.

Q. Was Hiram Hyde ever connected with you in business in any way? A. Yes.

Q. In what way? A. I loaned him money.

Q. How much money? A. I do not know; that was before your time; it was before 1856; and under the advice of Mr. Field I decline to answer such questions until somebody compels me to do it. That question goes back to somewhere in the neighborhood of 1849.

(Counsel for bankrupt states that he objects to any question going back of 1856, and directs the witness not to answer such questions until they shall have been certified to the court.)

Witness.—I decline to answer any question relating to matters previous to 1856, until the decision of the court is obtained.

Q. Did your wife have any property when you married her? A. I suppose she had some.

Q. How much?

(*Mr. Ensign* objects to the question, and witness declines to answer, for reasons before given.)

Q. Do you recollect, approximately, how much she had? A. I decline to answer, subject to the decision of the court.

Q. Was any property settled on your wife at the time of your marriage, by marriage settlement?

(Same objection.)

Q. Has your wife derived any property since her marriage and prior to 1856, either from you or from any other person, to your knowledge?

(Same objection.)

Q. If so, state what amounts, from whom, and what property?

(Same objection.)

Mr. Ensign.—The witness declines, by the advice of his counsel, to answer any question in regard to any transaction in respect either to his own or his wife's property prior to 1856, the date when Mr. Vail's debt was contracted, subject to the decision of the court.

Mr. Olmstead.—The counsel for Mr. Vail, the judgment debtor, proposes to ask such questions for the purpose of showing that all or most of the property which is now held in the name of Mrs. Craig, the wife of the bankrupt, was derived from her husband, the bankrupt, without any consideration from her, such questions to be certified by the Register to the court.

Q. How much property is your wife worth, to the best of your knowledge?

(Objected to.)

Q. Did your wife ever derive any of her property from you?

(Objected to as going back of 1856, and witness declines to answer.)

Q. Did you, on or about May 10, 1858, make any agreement with the American Telegraph Company, whereby you, together with your wife, assigned and transferred to the said company the interest of yourself and wife in certain agreements made between The Commercial Telegraph Company and John McKinney, Charles Spear, and Wilson G. Hemp, or other parties, or any interest in the said agreements.

Look at this paper and see if it is a copy of the paper. (Handing witness paper.) A. I should suppose that was the agreement I have in my mind.

Q. Did your wife sign that? A. I suppose she did; that is the paper I have referred to.

Mr. Olmstead offers the paper in evidence.

Mr. Ensign objects on the ground that the paper is a copy, and no proof has been made that the original is lost.

Q. Do you or not know whether any money was paid by the American Telegraph Company, or whether there was any other consideration moving from them for the assignment to them by yourself and wife of May 10, 1858?

Mr. Ensign.—I object to any questions with reference to the substance of the papers offered in evidence, on the ground that the originals must be produced.

Q. Was any money paid or was there any consideration moving from the American Telegraph Company to yourself and wife on any assignment of any interest to them?

(Same objection.)

(Answer taken, subject to objection.)

Q. What were the matters in which it was supposed you had an interest, and by reason of which you were called upon to execute the assignment to which you have referred?

(Objected to that it refers to transactions prior to 1856.)

(Answer taken, subject to objection.)

Q. Did you make any arrangement with the Telegraph Companies by which you were enabled to have the dispatches sent to you immediately following the dispatches sent to the Associated Press?

(Objected to.)

In re Preston.

I am of opinion that the several questions objected to by the petitioner were pertinent and proper, except the question as to whether the petitioner and wife transferred to the American Telegraph Company their interest in certain agreements made between the Commercial Telegraph Company and John McKinney and others, which question is objectionable in so far as it calls for the contents of any such agreement.

I am of opinion that the copy paper offered in evidence, purporting to be an assignment to the American Telegraph Company, is not admissible in evidence, on the ground that the same was a copy, as no proof was made that the original was lost, or, if not lost, no notice was given to produce the same.

Respectfully submitted,

ODLE CLOSE,
Register.

BLATCHFORD, J.—I concur with the Register in his views above stated.*

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Bankrupt may, by order of court, amend his schedules, even after the consideration of specification in opposition to his discharge.

In re ALVAN B. PRESTON.

BLATCHFORD, J.—The specifications are none of them supported by the evidence, but the bankrupt must amend his schedule of assets by inserting his claim against the estate of

* See also S. C., 4 N. B. R., 50 *quarto*, ▬ *octavo*; and *In re* West Clark et al., 4 N. B. R., 70 *quarto*, ▬ *octavo*.

Where the question relates to property of a stranger, the bankrupt need not answer. *In re* Van Tuyl, 1 N. B. R., 636, *octavo*.

Nor can he be examined as to business done or property acquired after date of filing petition in bankruptcy, unless it can be connected with the bankrupt estate.

John Turner. When that shall have been done a discharge will be granted.

John Lyon, for the bankrupt.

Charles A. Fowler, for the creditors.

UNITED STATES DISTRICT COURT—W. D. TEXAS.

On motion of creditors for an order to have assignee file a new general bond, of which two of the sureties had become bankrupt and the third surety was his wife, conditioned that he would faithfully discharge the duties of the office in every case in which he was or should become assignee,

Held, that a general bond for such purpose is not authorized by the Bankruptcy Act, but that an assignee must give special bond in each case where a bond is necessary.

By the laws of Texas a wife cannot charge her separate estate by becoming surety on such a bond, and nothing to its worth is added by her execution thereof.

In re JAMES MCFADEN.

DUVAL, D. J.—The assignee herein, I. K. Williams, and who is also assignee in many other cases in bankruptcy, had not given bond in any special case, but had given a bond in ten thousand dollars, conditioned for the faithful discharge of his duties in all cases in which he might be appointed assignee. Upon this bond the assignee's wife and I. W. and W. Flanigan, were sureties. Subsequently the assignee himself (the principal on the bond) and his sureties, the two Flanigans, went into bankruptcy. Under these circumstances exceptions have been taken by the counsel for certain creditors to the bond in question, and discussed before the Register, G. W. Whitmore, Esq.

These exceptions, so far as it is necessary to notice them, were:

First. That the bond, being a general one, and applicable to no particular case, was not such as the law requires.

This exception was overruled by the Register.

Second. That the wife of the principal, as one of the sureties on the bond, was not responsible in law thereon.

This exception was also overruled by the Register.

Third. That the principal and two of his sureties having gone into bankruptcy, another bond was necessary.

This exception was sustained by the Register, and the assignee was ordered to give bond anew in the sum of ten thousand dollars, to be held applicable to, and cover his responsibility in all cases in which he might be assignee.

The questions arising upon these exceptions, and upon which the Register and the creditors differ in opinion, have been certified to me for my decision. In my opinion the law contemplates that an assignee in bankruptcy should give a separate and distinct bond for each case in which he is appointed or elected, provided a bond be needed at all.

My impression, however, at the time the assignee gave the bond in question, was different, and that a general bond, such as he had given, would be sufficient to make him responsible in all cases. This impression was so expressed, I believe, to the Register, in reply to his verbal inquiry on the subject. But, from a careful investigation of the matter since, I am satisfied this idea was erroneous, and that the law contemplates the assignee should give bond in each case for which he is appointed.

The Register, I think, is mistaken in deciding that a wife can make herself or her separate property responsible by becoming a surety on such a bond as this. The decisions of the Supreme Court of this State have determined that the wife cannot charge her separate estate, except for necessaries, and cannot even convey the same by deed, except in the mode provided for by the statutes. No security, therefore, is added to the bond by her execution of the same.

In so far as the decision of the Register requires the assignee to give another bond in this case, the same is approved. In other respects it is overruled as being incorrect.*

* The bond must be given on the application therefor of any creditor. *In re* Fernberg, 2 N. B. R., 353, *octavo*. Yet only the District Judge can require its execution. *In re* Dean, 1 N. B. R., 249, *octavo*.

UNITED STATES DISTRICT COURT.—W. D. TEXAS.

Specifications opposing a discharge must be precise and definite, and must particularize facts, description of the grounds of opposition, setting forth time, place, person, etc.

Such specifications referring to facts supposed to be shown on an examination of bankrupt *held* to be faulty.

Facts relied upon in opposing discharge should be set forth alone, without reference to any matter *aliunde*.

In re J. D. EIDOM.

DUVAL, D. J.—Peter McGreal, Esq., a creditor of the bankrupt, having filed specifications, original and amended, in opposition to the discharge of said bankrupt, the same came on to be heard upon exceptions taken by the bankrupt's counsel to the sufficiency thereof.

The first exception is, substantially, that at, or a short time previous to the filing of his petition in bankruptcy, the bankrupt had on hand eleven bales of lint cotton, which he failed to render in his schedule "B," or surrender to the assignee as assets; and here the specification makes reference to the examination of the bankrupt before Mr. Register Whitmore, on the 19th and 20th days of April, 1869, from question 2 to question 17, inclusive.

A mere *failure* on the part of the bankrupt to render in property possessed by him on his schedules, is not made a ground by the act for refusing his discharge. The act does make the *concealment* of the same a ground for such action, but then it must be averred and proved that it was willful. If an allegation of "failure to render" be sufficient at all, it must be alleged to have been willful. For this reason, as well as because this specification is too vague and general in alleging the *time* when he had possession of said cotton, etc., I regard it as insufficient.

The first amended exception is insufficient, for the reasons stated in regard to this.

The second of both the original and amended specifications are vague, uncertain, and at variance with each other.

The former charges that at the time of filing his petition, the

bankrupt was the owner of three hundred and twenty-seven and a half acres of land (as shown by his schedule "B,") encumbered by vendor's lien in favor of J. M. Copeland, which lien was subsequently, in pursuance of an agreement between said Copeland and the bankrupt, waived as to two hundred acres, and the remainder only sold in satisfaction of said vendor's lien, thereby willfully defrauding his creditors. And here reference is made to the examination of the bankrupt had before the register.

The latter (viz., the second amended specification) alleges that the bankrupt falsely represented that said Copeland had a lien upon the three hundred and twenty-seven and a half acres for two hundred dollars; and that R. E. House, assignee of bankrupt, sold one hundred and twenty-seven acres of said land to Copeland in payment of said lien, which is charged to have no existence, etc.

Neither of these specifications, vague and conflicting as they are, seem to me to constitute any ground mentioned in the act for refusing the bankrupt his discharge. They form a charge more against the assignee than the bankrupt.

The third original specification is, that the assignee of bankrupt, by mistake or inadvertence, has set apart to the bankrupt certain property as exempt, which is not exempt by law, and which should be subject to his creditors.

This is clearly no ground for opposing the discharge. The propriety of the assignee's action in this respect should have been contested at the proper time and in the proper manner. It cannot furnish a reason for refusing the discharge.

The fourth of the original specifications is that the said bankrupt has been guilty of gross negligence in willfully permitting the twelve hundred pounds of seed cotton mentioned in schedule "B," "*and a large amount of cotton in the patch* to be destroyed and eaten up by cattle," etc. No time is alleged at which the bankrupt permitted this willful destruction, nor is there any specific charge as to the amount of cotton, excepting the twelve hundred pounds. Neither is it alleged that the bankrupt was in charge of this cotton at the time of its loss, or

that he was responsible for it. For aught that appears in the specification, it may have been destroyed after the assignee had been appointed.

Specifications in opposition to a discharge in bankruptcy must be precise and definite. They must particularize facts descriptive of the offense as charged, constituting the ground for objecting to the discharge, setting forth, as clearly as may be, the time, place, person, etc. A specification, containing a reference to facts supposed to be shown on an examination of the bankrupt by the Register, is, in that respect, I think, faulty. The facts alone, showing a ground under the 29th Section for resisting the discharge, should be set forth without reference to any matter *aliunde*.

The exceptions to the specifications in this case are sustained, and the discharge is ordered to issue.*

UNITED STATES DISTRICT COURT—W. D. TEXAS.

Creditors petitioned to have debtor declared bankrupt; process issued thereupon, and bankrupt, by indorsement on copy of said petition served upon him, admitted the truth of the allegations therein contained, except as to those of fraud, and before the day to appear and show cause, the bankrupt filed his voluntary petition in the same court and was adjudicated bankrupt by proper Register.

On motion to set aside the said adjudication of bankruptcy as void,

Held, That the same was nugatory and of no effect pending the proceeding in involuntary bankruptcy. Adjudication accordingly set aside and debtor adjudged bankrupt by the court on petition of creditors, and schedules previously filed by him ordered to be held as filed under such adjudication.

In re R. R. STEWART.

DUVAL, D. J.—On the 4th June, 1868, Zenia, Aldrich & Co., as creditors, filed their petition praying that Stewart should be

* See also; *In re* Rathbone, 1 N. B. R., 294, 324, *octavo*. *In re* Beardsley, 1 N. B. R., 304, 457, *octavo*. W. D. Hill, 1 N. B. R., 275, *octavo*. Mawson, *Id.*, 437. *Smith* v. *Beckford*, 5 N. B. R., 20. *In re* Burk, 3 N. B. R., 76 *quarto*, *octavo*. Where the specifications are vague, they may be disregarded, *In re* Son, 1 N. B. R., 310, *octavo*. *In re* Tyrrell, 2 N. B. R., 200, *octavo*. *In re* Hansen, 2 N. B. R., 211, *octavo*. *In re* Dreyer, 2 N. B. R., 212, *octavo*. *In re* Waggoner, 1 Bt., 532.

adjudged a bankrupt, and alleging the commission of certain acts as grounds therefor.

Process was issued, requiring said Stewart to appear, on the 2d day of November, instant, and show cause why the prayer of the petition should not be granted.

On the 27th day of August, 1868, the said Stewart, by an indorsement on the copy of the creditor's petition, served upon him, admitted that all the statements, charges, and allegations in said petition were true, except those of fraud. Before the time had elapsed in which he was called upon to appear and answer, the said Stewart, to wit, on the 12th day of October, 1868, filed his petition in voluntary bankruptcy, and such proceedings were had thereon that on the 27th of October, 1868, he was adjudged a bankrupt on his own petition by Mr. Register Whitmore.

The attorneys of Zenia, Aldrich & Co. now move the court to consolidate the two cases named above, or to declare and adjudge that the adjudication of Stewart, as a bankrupt, on his voluntary petition, be set aside and held for nought, and the case of the creditors held for trial.

It never was intended by the Bankrupt Act, and no correct rule of practice can tolerate it, that when a creditor has instituted proceedings to force his debtor into bankruptcy, that such debtor should be allowed to become a bankrupt, and be adjudicated as such on his own petition, before a determination of the creditor's petition. To permit such a practice might work a most flagrant wrong upon the rights of a petitioning creditor. I think, therefore, that the adjudication of Stewart, as a bankrupt, on his own petition, when the application of the creditors, Zenia, Aldrich & Co., for that purpose, was pending, undetermined, was nugatory and void, and the same is ordered to be set aside.

The court, entertaining alone the creditor's petition, and looking to the charges therein contained, the admissions of Stewart made in reply thereto, and the fact of his application, voluntarily made, to be adjudged a bankrupt, finds the allegations in said petition to be true, and adjudges him a bankrupt thereon accordingly.

And, inasmuch as the said bankrupt has filed, with his voluntary petition, full and complete schedules of his property, liabilities, etc., it is ordered that they be held and regarded as if filed under adjudication of bankruptcy made against him on said creditor's petition, and have the same binding and legal effect.

It is further ordered that such other and further proceedings be had as the bankrupt law requires in cases of involuntary bankruptcy, and as may be applicable in, and proper to this case.

UNITED STATES DISTRICT COURT—S. D. GEORGIA.

The vendor's equitable lien upon land sold is not discharged by the subsequent taking of a mortgage upon the same land, and takes precedence over a judgment lien obtained prior to the said mortgage.

In re GOODE BRYAN.

I, FRANK S. HESSELTINE, Register of said court in bankruptcy, do hereby certify, that in the course of the proceedings in said cause the following questions arose pertinent to said proceedings, and were stated and agreed to by Richard K. Hines, Esq., who appeared for Francis W. Forth, a creditor, and L. P. D. Warren, Esq., who appeared for John Neal, another creditor of the said bankrupt.

In the year 1858, the said Forth sold to Goode Bryan a tract of land, and took from the said Bryan his three equal promissory notes for the payment of the purchase-money. Bryan received a deed to the land, which deed recited the three notes as the consideration for the same; this deed was never recorded. Afterward, the said Neal, a creditor of Bryan, recovered three judgments against him in the Superior Court of Lee county, Georgia, the first being in the year 1861, the second in 1863, and the third in 1865. In the year 1866, the said Bryan executed to the said Forth, a mortgage on the said land, to secure the payment of several notes, two of which are the ori-

ginal notes given for the purchase-money of the land in 1858. These two notes have never been paid; the land has been sold by the assignee; and Forth claims the prior lien on this fund by virtue of his vendor's lien, which Neal opposes, asserting that Forth has waived that lien by taking the mortgage from Bryan, and that his judgment liens are superior to that of the mortgage.

The single question here presented for the decision of your Honor is: Did the creditor, Forth, by subsequently taking a mortgage upon the land sold, to secure two of the notes given therefor, waive his vendor's lien on this land?

As the issue submitted is one of much importance, involving a considerable sum of money, I have given some little time to the examination of the law, and to the consideration of the whole matter, in order to present in as clear and as correct a light as possible the law, as I view it, and its application to this question, for the consideration of your Honor, in arriving at a decision thereon.

What amounts to a waiver of the vendor's lien?

The ablest jurists have given widely different answers to this question. The law on the subject is afloat; and to ascertain from its previous positions the course to a correct and just conclusion in any case, is a labor not without difficulty.

This much, I believe, is established in England and in this country, that the vendor, by taking the personal obligation, note, or security of the vendee, does not waive his lien.

Beyond this the decisions are conflicting.

In England, the doctrine that the taking of a bond or other distinct and independent real, personal, or collateral security by the vendor, is a waiver of the lien, as he thereby signifies his intention to look to that security, is laid down in *Nairne* v. *Prowse*, 6 Vesey, 752; where Sir Wm. Grant decided that the vendor, by taking a pledge of stocks, waived his lien. Also, in *Winter* v. *Lord Anson*, 1 Simon & Stewart's Rep., 434, where the taking of a bond was held to be a waiver of the lien; and in *Bond* v. *Kent*, 2 Vern. Rep., 281; where a mortgage on the land, taken at the time of sale for a part, and a

note for the balance, was held to be a waiver as to the balance; though in this case there was, it appears, strong negative evidence that the *vendor did not intend to retain his lien for the balance.*

But that these facts are not, *ipso facto*, a waiver, is declared by Lord Eldon in *Mackreth* v. *Symmons*, 15 Vesey Rep., 329, where this whole question is elaborately reviewed and considered. This doctrine is also opposed by the decision in *Blackburn* v. *Gregson*, 1 Bro. C. Rep., 420, where the taking of a bond was held not to be a waiver; in *Harrison* v. *Southcote*, 2 Vesey Snr., 389, p. 9, where there were but part payment and a bond for the remainder, Lord Hardwicke, by implication, deciding that the lien would not have been lost; in *Elliott* v. *Edwards*, 3 Bos. and Bul., 181, where the covenant of the vendee, together with the undertaking of a surety, was held to be no waiver; in *Grant* v. *Mills*, 2 Vesey & Beames, 306, where it is decided that the taking of a bill of exchange, accepted by the vendee and his partner, is not a waiver of the lien; and in *Saunders* v. *Leslie*, 1 B. & B. Rep., 505, where the taking of a *mortgage on another estate* was regarded *not conclusive evidence* of a waiver of the lien.

An inspection of the decisions made by the courts in the several States shows that no greater uniformity exists here.

The doctrine that the taking of other distinct real or collateral security, or personal security other than the vendee, is a waiver of the lien, is supported by very many authorities. See the following cases where the taking of the promissory note of the vendee, with a third person as a surety or indorser, is held to be a waiver of the lien: *Way* v. *Valley*, 1 Carter, (Ind.) Rep., 102; *Vail* v. *Foster*, 4 Comst., 312; *Williams* v. *Roberts*, 5 Ohio, 35; *Follett* v. *Reese*, 20 Ohio, 546; *Eskridge* v. *McClure*, 2 Yerger, 84; *Trustee of School* v. *Wright*, 11 Illinois, 603; *Johnson* v. *Sugg*, 13 S. & M., 546; *Bradford* v. *Marion*, 2 Florida, 463; and *Boon* v. *Murphy*, 6 Blackf., 272. In the last case it was decided to be a waiver, unless there was an express agreement to the contrary; and in the preceding

case only *prima facie* so; and the onus was on the vendor to disprove it.

In the case of *Taylor* v. *Adams*, Gilmer, (Va.) Rep., 329, and in *McClure* v. *Harris*, 12 B. Mon., 261, it was decided that where the vendee by agreement gave his notes, secured by a mortgage on the land, to a *creditor* of the vendor, the lien did not exist. In these cases it will be noticed that the mortgages were given *at the time* of the conveyance, and that the position of the creditors is analogous to that of an assignee of the vendor, who acquires no lien. In *Young* v. *Wood*, 11 B. Mon., 123, the vendor received part payment, and *subsequently* took a mortgage on the land, and on *other property*, which was held to be a waiver of the lien.

Yet this doctrine is denied by *Magruder* v. *Peters*, 11 Gill & Johnson, 217; 3 Bar, S. C. Rep., 267, where it is laid down that the accepting of a promissory note with an indorser is not a waiver of the *vendor's lien.*

And in *Duval* v. *Bibb*, 4 Hen. & Munf., 112, and *Cox* v. *Fenwick*, 3 Bibb Rep., 183, where it is decided not to be a waiver to take a bond with surety. See also *Dubois* v. *Hull*, 43 Barb. Rep., 26, where obtaining a judgment lien was held to be no waiver. *Daughady* v. *Paine*, 6 Minn., 443, where a mortgage on the land did not waive the lien, it being agreed otherwise, and *Neil* v. *Kenney*, 11 Ohio, N. S., 58, where the taking of a mortgage on the land did not waive the lien.

It is not strange that many jurists, observing the conflict and confusion of the law on this question of what is a waiver of the vendor's lien, have deplored the departure from the strict and simple rule of the old Roman law.

It has been stoutly maintained by some eminent judges that this question, as to whether the lien has been waived, is one to be decided by the circumstances and evidence in each case. Lord Eldon, in *Mackreth* v. *Symmons*, said: "It does not, however, appear to me a violent conclusion as between vendor and *vendee*, that, notwithstanding a *mortgage*, the lien should subsist; the principle has been carried this length—that the lien exists, unless an intention, and a *manifest intention*, that it

shall not exist, appears." And again: "But the doctrine as to taking a mortgage or pledge would be carried too far, if it is understood as applicable to all cases, that a man taking one pledge therefore necessarily gives up another, which must, I think, be laid down upon the circumstances of each case, rather than universally."

And Justice Story, notwithstanding his *obiter dictum* in *Gilman* v. *Brown et al.*, 1 Mason, 191, where he said, "I have no hesitation to declare that, taking the security of a third person for the purchase-money *ought* to be held a complete waiver of any lien upon the land." * * * * "At all events, it is *prima facie* evidence of a waiver, and the *onus* is on the vendor to prove by the most cogent and irresistible circumstances that it ought not to have that effect," says, in his Equity Juriprudence, Vol. II., Section 1224: "Generally speaking, the lien of the vendor exists; and the burden of proof is on the *purchaser* to establish that, in the particular case, it has been intentionally displaced, or waived by the consent of the parties. If, under all the circumstances, it remains in doubt, then the lien attaches." Again: "The taking of a security for the payment of the purchase-money is not of itself, as it was in the Roman law, a positive waiver or extinguishment of the lien. * * * * But the taking of a security has been deemed at most as no more than a presumption under some circumstances of an intentional waiver. And if a security is taken for the money, the burden of the proof has been adjudged to lie on the *vendee*, to show that the vendor agreed to rest on that security and to discharge the land. Nay, even the taking of a distinct and independent security—as for instance, of a mortgage on another estate, or a pledge of other property—has been deemed not to be conclusive evidence that the lien is waived." This doctrine has been adopted by the Supreme Court of this State. *Vide Mims* v. *M. & M. & H. R. R. Co.*, 3 Kelley, 342; *Mims et al.* v. *Lockett*, 23 Ga., 241.

Since, then, there is no fixed law as to what amounts to a waiver of the vendor's lien, is it not necessarily a question of fact to be determined by the circumstances of each case? I do

not see why it is not justly so. The vendor is given an equitable lien or mortgage on the land sold, to secure the payment of the purchase-money. He seeks to enforce it, and is opposed by the *vendee*, or other party in interest, on the ground that he has accepted other security in place of this lien—that he has voluntarily consented to yield it. Is this true? Did the vendor regard the other security as the equivalent of his lien? and did he intend and agree to accept it for, and give up that lien? This fact must be proved, and not concluded. If it was contended that he, at the time of the sale, waived the lien and agreed not to look to the land, but the personal credit of the *vendee*, would not this be a question of fact, to be established by the *vendee?*

Now, if it is contended that he has waived his lien—consented to yield it by taking other security, as a bond or note with a surety; since it *might* have been part of the agreement or terms of the sale that he was to have also the bond, note, or other security as a readier means of payment, or as a protection in case of depreciation in the value of the land, or the destruction of its improvements—the land still remaining liable in case the other failed—inasmuch as the additional security might have constituted a part of the consideration of the sale, is not his agreement or intention to waive the lien as much a question of fact, to be fully established by evidence, as it is in the former case? Is the court from an act to conclude an agreement, when that act might have reasonably been one of the terms of an exactly opposite agreement? Will it conclude that A cannot agree to sell the land to B for certain bonds, notes, or stocks, the land to remain subject to the vendor's lien until he receives payment for it? The taking this or that security may or may not, according to the nature of the security or the circumstances of the case, be *prima facie* evidence of an intention or agreement to waive the lien; and the burden of proof may, by strong corroborating circumstances, going to show such an intention, be shifted from the vendee to the vendor; yet the presumption may be rebutted, and the fact as to what was the agreement or intention remains to be established

by evidence, not concluded by law. In the language of Justice Story, "*If under all the circumstances it remains in doubt, then the lien attaches.*"

Concluding then, that the question whether the vendor has waived his lien, is a question of fact, to be established by evidence—and the Supreme Court of this State has so decided—how shall the case before the court, from all the evidence presented, be decided?

I no longer find any difficulty in coming to a conclusion.

It will be noticed that in the cases cited the question decided was, whether the lien *ever vested* in the vendor? Did he at the *time of the sale* waive it? Here it is not disputed that Forth for a long time enjoyed a lien on this land; and the question is not—did he by any act at the time of the sale waive his lien, but did he after long possession surrender it?

It seems to me that stronger evidence is requisite to establish the giving up of a lien or advantage enjoyed for eight years, than to prove that there was no intention ever to possess it—stronger that it was destroyed than that it never existed. Does not the mind demand clear, indubitable evidence of at least an adequate reason or consideration for the surrender of the lien, before it will find an intention or agreement to yield up the present advantage? Is there such evidence here? I think not. If Forth had taken this mortgage at the time of the sale, inasmuch as the legal mortgage would have been equal to, and taken the place of the equitable mortgage, it would have been natural and reasonable to conclude, as it has been in some cases, that it was the intention to waive the vendor's lien. But it is not reasonable to suppose that a lien of eight years' duration, older and superior to all, is intentionally abandoned or surrendered for an infant mortgage, weaker than the judgment of yesterday.

The only evidence before the court is, that Forth, in the year 1866, took a mortgage on the land sold to secure the two notes remaining unpaid, and certain other notes. The intention to surrender the superior lien, possessed since 1858, is not to be assumed from the single fact of the taking of this inferior se-

curity. A slight knowledge of the principles upon which men barter and exchange, forbids such a forced conclusion as that the one was given for the other. I can easily conjecture a better reason for the taking of this mortgage. For instance, Forth's ignorance of his vendor's lien—a belief on his part that the existing vendor's lien perished, by virtue of the Code, on the 1st of January, 1863, the contrary not being declared by the Supreme Court until a late day. These and other causes readily suggest themselves, none of which go to establish an intention or agreement to forego the advantage of the existing lien, and they are not so forced as that conclusion set up for the purpose of getting rid of the prior lien, and bringing in ahead the lien of the subsequent judgment. That the taking of an additional security, of an inferior or equal degree with the former, will not *ipso facto* discharge a lien which attached by reason of the original security, is decided in *Schenk* v. *Arrowsmith*, 1 Stock (N. J.), 314.

Since this opinion was written, I have found a digest of the decision of the court, in the case of —— v. *Ewing*, 17 Ohio, 500, which case is analogous to the one before the court. As I have not the volume I have been unable to follow the reasoning of the court, or compare its decision with the synopsis, as reported in the digest, which states it as follows:

"The vendor of land, by taking a mortgage upon the land sold, to secure the payment of the purchase-money, does not extinguish his prior equitable lien, and the lien of a judgment creditor, obtained between the date of the mortgage and the time when it is recorded, will be postponed to the vendor's lien."

The case sustains the view which I have taken, that Forth, by subsequently taking a mortgage upon the land sold to secure the payment of the purchase-money, did not waive his prior vendor's lien; that his lien is prior to the lien of the subsequent judgment, and must first be satisfied out of the proceeds of the sale of the land.

Respectfully submitted,

FRANK S. HESSELTINE, *Register*,

I have carefully read nearly all the authorities cited or referred to by Mr. Register Hesseltine, and although there is a diversity of opinion on the question as to what act and intention will be a waiver of the equitable lien of the vendor of land, I think the Register has adopted the correct view in his opinion, and that his conclusion is right; I therefore affirm his decision.

The clerk will certify this affirmance to Mr. Register Hesseltine.

JOHN ERSKINE,
U. S. Judge.

UNITED STATES DISTRICT COURT—S. D. OHIO.

Held, that although the term indorser is not specially used in the 35th Section of the Bankrupt Act, that it was the intention of the law to make any payment or preference to an indorser or other surety fraudulent and void where the other elements in the transaction existed to give it that character.

Where defendant had indorsed the note of Sugarman & Frank, payable to the order of himself, which was discounted at the bank of Espy, Heidelbach & Co., and seven days before the same became due by its terms, the defendant received from Sugarman & Frank, who were then insolvent, bills and drafts, with instructions to apply them to the payment of the note held by Espy, Heidelbach & Co., and the same were accepted by those bankers as payment of the said note, which was taken up and canceled; *Held*, 1st, as Espy, Heidelbach & Co. were not apprised of the insolvency of Sugarman & Frank, that the payment to them was not a preference in fraud of the law; 2d, that they were not the parties benefited by the payment, as, the defendant being solvent, his indorsement made them wholly safe; 3d, that the defendant was the person "to be benefited by the payment," whether made before or after maturity of the note, and that, he having reasonable cause to believe them insolvent at the time of such payment, any appropriation of their means to pay or indemnify him is condemned by the statute, and that defendant was liable to the assignees of the bankrupts for the amount paid by him to Espy, Heidelbach & Co.

6 B.R.477

DANIEL AHL, JR., AND ALEXANDER BUCHMAN, *assignees of* SUGARMAN & FRANK, *v.* SAMUEL THORNER.

LEAVITT, J.—This is a petition in chancery, prosecuted by said Ahl and Buchman, as assignees in bankruptcy, to recover from the defendant, Thorner, the sum of four thousand nine hundred and ninety dollars, which they allege to have been paid by said Sugarman & Frank to Thorner, in fraud of the Bankrupt Law of the United States.

The material facts involved may be comprehensively stated as follows: In July, 1867, the said Sugarman & Frank were doing business in Memphis, in the State of Tennessee, as partners; some time during that month, at the request of Sugarman, the said Thorner, residing at Cincinnati, and the brother-in-law of said Sugarman, and then a member of the firm of Heidelbach, Seasongood & Co., indorsed the promissory note of Sugarman & Frank for five thousand dollars, payable to the order of Thorner ninety days after date. This note was discounted by Espy, Heidelbach & Co., bankers, at Cincinnati. Not being paid at maturity, on the 21st of October, 1867, a renewed note for the same sum at ninety days was given by Sugarman & Frank, and indorsed by Thorner. This note, by its terms, would have been due the 23d of January, 1868. On the 16th of that month the defendant, Thorner, received from Sugarman & Frank bills or drafts on a house in New York for five thousand three hundred dollars, with instructions to apply them to the note held by Espy, Heidelbach & Co. These bills or drafts were accepted by said bankers in payment of said note, and the note was taken up and canceled. The difference between the proceeds of the drafts or bills remitted to Thorner, and the sum due on Sugarman & Frank's note, was paid, by direction of Sugarman, to his wife, then living at Cincinnati.

The bill sets forth that on the 11th of May, 1868, a petition was filed in this court by certain creditors of the said Sugarman & Frank, alleging various acts of bankruptcy by them, and praying that they might be adjudged bankrupts. And on the 21st of September, in the year last named, the firm, and the individual members of the firm, were decreed to be bankrupts, and the said Ahl and Buchman were duly appointed and qualified as their assignees. They allege, in their bill, that at the time Sugarman & Frank remitted to Thorner the drafts to pay the note for five thousand dollars held by Espy, Heidelbach & Co., they were insolvent, and that Thorner had just cause to believe them to be insolvent, and that, therefore, the payment of the note was an unlawful preference to Thorner, and illegal and void as in violation of the Bankrupt Act. And the assign-

ees allege a right to recover from Thorner the sum so paid, to be applied to the claims of the firm creditors of Sugarman & Frank.

Before referring to the evidence, and with a view to a more intelligent application of the law to the facts, it may be well to notice briefly the provisions of the 35th Section of the Bankrupt Act, so far as they apply to the transactions in question. That section declares "That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, * * * makes any payment, pledge, assignment, transfer, or conveyance * * * the person receiving such payment, pledge, assignment, transfer, or conveyance, having reasonable cause to believe such person is insolvent, and that such * * * payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value thereof, from the person so receiving it, or so to be benefited thereby." The section then provides that if any person, being insolvent, or in contemplation of insolvency, within six months before the filing of the petition by or against him, shall make any payment or transfer of property to a person having reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, transfer, etc., is made with a view to prevent his property from coming to his assignee, or prevent the same from being distributed under the act, or in any way to impede, impair, delay, or defeat the operation of the act, the same shall be void, and the assignee may recover the property or the value as assets of the bankrupt.

In deciding whether the transaction involved is within the prohibitions of the 35th Section, and therefore void, the following inquiries necessarily arise:

First. Was the firm of Sugarman & Frank insolvent or acting in contemplation of insolvency in the payment of their note, on which Thorner was liable as indorser?

Second. Was the note paid with a view to a preference to Thorner over other creditors of Sugarman & Frank?

Third. Had Thorner reasonable cause to believe that Sugarman & Frank were insolvent?

Fourth. Was Thorner under such a liability as indorser for the firm, as that the payment of the note inured to his benefit within the meaning of said section of the Bankrupt Act?

1st. As to the insolvency of the firm of Sugarman & Frank, on the 16th of January, 1868, when Thorner paid their note to Espy, Heidelbach & Co., with the proceeds of the drafts remitted to him by Sugarman & Frank, there is no room for doubt. The evidence proves, conclusively, that in December, 1867, the firm was unable to meet its liabilities. There were large debts owing to Cincinnati houses, which were past due and unprovided for. The debts of the firm then were in excess of one hundred thousand dollars, and their assets and means of payment, according to the estimate of witnesses well acquainted with their affairs, would not pay more than twenty-five or thirty cents on the dollar. It is in evidence, by Seasongood, a witness in the case, that in December, 1867, Sugarman admitted to him that the firm were unable to pay their debts. The same witness states that he considered the firm insolvent in the spring of 1867.

2d. The second inquiry is, whether Sugarman & Frank, in paying the note to Espy, Heidelbach & Co., on which Thorner was indorser, intended a preference to him, within the meaning of the 35th Section of the Bankrupt Act. This is a question of intention, which can only be determined by a reference to the facts connected with the transaction. And here the familiar principle, that every man intends what he knows must be the necessary result of his acts, applies. Sugarman & Frank must have known the firm was hopelessly insolvent when the note in question was paid. It is impossible, therefore, not to infer that in paying this note they were virtually preferring Thorner to other creditors. The effect of the payment clearly was to withdraw so much from the assets of the firm, which should have been applied to the equal benefit of

all its creditors. This was clearly in conflict with the policy and requirements of the Bankrupt Law. Thorner, as their indorser, had no privilege or immunity superior to those of the general creditors.

3d. The next inquiry is whether Thorner had reasonable cause to believe Sugarman & Frank were insolvent at the time the note was paid. On this point the evidence is clear and conclusive. Thorner was apprised of the fact that the claim of Seasongood, Heidelbach & Co., of which he was then a member, against Sugarman & Frank, for upward of six thousand dollars, was entered in the books of the former firm to the account of profit and loss, with the consent and knowledge of Thorner. It is also in evidence that one of the firm of Seasongood, Heidelbach & Co., offered to sell the claim of that firm on Sugarman & Frank to Thorner at fifty cents on the dollar, which Thorner declined. It is also proved that during the month of December, Sugarman was in Cincinnati, asking his creditors for an extension, and that several meetings of the creditors were held to confer on that question, at several of which Thorner was present. It is also in evidence that Thorner visited Memphis some time before these meetings of creditors, and upon his return admitted in conversation that he had advised Sugarman & Frank to apply for the benefit of the Bankrupt Act. These facts, with others that might be referred to, prove conclusively not only that the firm was hopelessly insolvent, but that Thorner was fully advised of its insolvency.

4th. The only remaining question is whether Thorner's liability as indorser for Sugarman & Frank was such, that the payment of the note inured to Thorner's benefit within the meaning of the 35th Section of the Bankrupt Act.

On this point there seems to be no decisions of any of the courts of bankruptcy that are directly applicable. And the court is called upon to decide the question in view of the construction to be given to the section referred to. The first part of that section before quoted provides that any payment, pledge, assignment, transfer, or conveyance by a person being insolv-

ent or in contemplation of insolvency, if the person to whom the same is made is "to be benefited thereby, and has reasonable cause to believe such person to be insolvent, and that the same is made in fraud of the provisions of the law, shall be void; and the assignee is authorized to sue for and recover the value, from the person receiving the same, or so to be benefited." And as throwing some light on the question of construction of these provisions of the 35th Section, it is proper to note, that by the 39th Section, which enumerates the causes for which a person may be declared a bankrupt, it is provided that a payment, transfer, etc., to any person or persons who are or may be liable as "indorsers, bail, sureties, or otherwise, with intent to defeat or delay the operation of the act," or to give a preference to any creditor, shall be ground for an adjudication of bankruptcy. This is only referred to as showing that, although the term *indorser* is not specifically used in the 35th Section, it was the clear intention of the law to make any payment or preference to an indorser, or other surety, fraudulent and void, where the other elements in the transaction existed to give it that character.

The only question, therefore, arising under the fourth inquiry suggested is, whether the sending the Eastern drafts by Sugarman & Frank to Thorner, to be applied by him to the payment of the five thousand dollar note held by Espy, Heidelbach & Co., on which Thorner was indorser, was a payment to him as the person to be "benefited thereby," within the clause of the 35th Section, referred to. The argument mainly insisted on by the counsel for the defendant is that, as the note held by the bankers on Sugarman & Frank was taken up by Thorner a few days before its maturity, he was then under no liability as indorser, and the payment of the note by Sugarman & Frank did not inure to his benefit, in the sense of making the payment with an intent to give a preference within the meaning of the law. It seems to the court this construction of the statute is too limited to meet either the spirit or intent of the act. While it is true Thorner's legal liability could not be legally enforced, as indorser, until the maturity of the note and demand

of the maker, and notice of non-payment, yet, in the statutory sense of the term there was a liability by Thorner from the date of the indorsement. He was the person to be benefited by the payment, whether made before or after the maturity of the note. He was thereby relieved from his liability, and therefore beneficially interested in the payment. And if Sugarman & Frank were insolvent at the time of the payment, and Thorner had reasonable cause so to believe, it was a fraudulent preference within the meaning of the law, without reference to the means or agency by which Sugarman & Frank made the payment. They were in a condition of insolvency, in which any appropriation of their means to pay or indemnify a creditor, who was aware of such insolvency, is condemned by the statute. It was a preference to one liable for him, and to be benefited thereby, which he had no right to make.

It is further contended by defendant's counsel, that if the payment of the note imports a fraudulent preference, it was a preference to the bankers who held the note, and not to Thorner, the indorser. That this view cannot be sustained is clear from two considerations: First, there is no proof or pretense that Espy, Heidelbach & Co. were apprised of the insolvency of Sugarman & Frank, and therefore the payment to them was not a preference in fraud of the law. Second, They were not the parties benefited by the payment, as Thorner's indorsement made them wholly safe, as he is admitted to have been entirely solvent, and able to meet any demand against him. It was, therefore, of no importance to them whether Sugarman & Frank paid the note, either before or at its maturity, as they would have been paid at once by the indorser when the note became due.

The court, from the view stated, must hold the defendant liable for the amount paid to Espy, Heidelbach & Co., to be appropriated by the plaintiffs as assignees of Sugarman & Frank, for the equal benefit of all their creditors entitled to make proof of their accounts and claims.

Moulton, Bateman & Johnson, for plaintiffs.

Long & Hoeffer for defendant.

UNITED STATES CIRCUIT COURT—E. D. NEW YORK.

Mortgagees of certain realty; assets of a bankrupt corporation, brought suit in the State court to foreclose, and made the assignee in bankruptcy a defendant. The assignee filed a petition in the United States District Court, praying that proceedings in the foreclosure suit be stayed, and that the mortgage be set aside as invalid. Further proceedings were accordingly enjoined, whereupon mortgagees petitioned for review, denying the jurisdiction of the District Court upon the petition of the assignee aforesaid.

Held, that the District Court had jurisdiction under Section 1 of the Bankrupt Act.

Proceeding by the assignee should have been by bill in equity, and not by petition.

Leave granted for petition to be amended and filed as such bill.

In re New York Kerosene Oil Co.

Nelson, C. J.—This is a petition for a review of an order of the District Court, sitting in bankruptcy.

The case is this: The Kerosene Oil Company was adjudged and declared a bankrupt on the 16th day of June, 1868, Charles Jones, the petitioner, being appointed assignee. At the same time the New York Guaranty and Indemnity Company held a mortgage against the bankrupt corporation, which, it claimed, was a lien on a part of the assets; and on the 10th of October following, commenced a suit in the Supreme Court of the State to foreclose said mortgage, making, among others, the assignee in bankruptcy one of the defendants. The amount secured by the mortgage was one hundred thousand dollars. On the 30th of October, 1868, the assignee presented a petition to the District Court, alleging, among other things, the invalidity of the mortgage, and praying that it be declared of none effect and void for reasons set forth in the said petition, and that the mortgaged premises be sold and the proceeds brought into court and disposed of according to the rights of the several parties interested therein, and also that an injunction be issued out of the said court, enjoining the Guaranty and Indemnity Company, their officers or agents, from taking any further proceedings in the foreclosure suit. This injunction was granted, and the defendants were required to answer

the petition. The defendants claim that the District Court has no jurisdiction over this foreclosure suit in the Supreme Court, and that it was in error in enjoining the proceedings in the same; and further, that if the court had jurisdiction, the proceeding to restrain the same and to adjudicate on the rights of the parties, should have been by bill, and not by this informal and summary proceeding.

First. We are inclined to think that the District Court had jurisdiction in the case under the 1st Section of the Bankruptcy Act, which provides that the jurisdiction shall extend to all controversies between the bankrupt and any creditor or creditors, and among other things "to the ascertainment and liquidation of the liens and other specific claims thereon;" that is, on the assets, and "to the adjustment of various priorities and conflicting interests of all parties," etc. In the present case, the proceedings were instituted in the Supreme Court of the State, after the Kerosene Oil Company had been declared a bankrupt and an assignment of the assets had been made. Whether or not it would be otherwise as to the jurisdiction, if the suit had been pending in the State Court at the time of the institution of the bankrupt proceedings, is a question which we do not intend to determine in this case.

Second. But we are of opinion that the proceeding by the assignee against the defendants (Guaranty and Indemnity Company) should have been by bill in equity, and not in this informal and summary way. The 2d Section of the act provides that the Circuit Courts shall have concurrent jurisdiction with the District Courts of all suits at law or in equity, which may be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of the bankrupt, etc., but limits the suits so that they must be brought within two years from the time the cause of action accrued for or against the assignee.

The 6th Section gives an appeal from the decrees of the District Court to the Circuit Court in equity, and a writ of error in cases at law, when the debt or damages claimed amount

to more than five hundred dollars. The residue of the section applies principally to the case of a creditor or creditors, whose claim before the District Court has been rejected in the course of the bankruptcy proceedings, and has no application to the present case, as the Guaranty and Indemnity Company have not appeared as a creditor therein. The 9th Section allows an appeal or writ of error from the Circuit to the Supreme Court, where the matter in dispute exceeds two thousand dollars. Now, under the 2d Section of the act and the concurrent jurisdiction there conferred, this proceeding might have been instituted in the Circuit Court. It is a proceeding by the assignee against a person claiming an adverse interest, within the very words of the section; and it seems to me that a fair interpretation of them would require the proceeding to be a suit at law or in equity, as the case might be, and if so, we think the proceeding should be the same in the District Court. It is by no means clear that an appeal would lie, from a decision of the District Court to the Circuit Court, under the 8th Section, in the summary proceedings in the present case.

We shall direct, therefore, that the petition of the assignee to the District Court be amended and filed as a bill in equity; and that on serving a copy of the same on the attorney of the defendants, they plead or answer within and according to the rules and practice of the court, and that all proceedings be stayed as respects the Guaranty and Indemnity Company, their officers and agents, in the foreclosure suit in the State court, and that all orders and proceedings in said case, inconsistent with the above order, be vacated and set aside.

B. F. Tracy, for the assignee.

Barney, Butler & Parsons, for the Guaranty and Indemnity Company.*

* As to the jurisdiction of the court. *In re* Campbell, 1 N. B. R., 165, *octavo*. *Markson* v. *Henry*, 4 N. B. R., *octavo*. *In re* Kerosene Oil Company, 2 N. B. R., 528, *octavo*. *Irving* v. *Hughes*, 2 N. B. R., 62, *octavo*. *In re* Fuller, 4 N. B. R., *octavo*. *In re* Lady Bryan Mining Company, 6 N. B. R., 252. *In re* Mallory, 6 N. B. R., 22; *Samson* v. *Clark*, 6 N. B. R., 403.

As to mode of application for exercise of the power, *Smith* v. *Mason*, 6 N. B. R., 1. *In re* Casey, 8 N. B. R., 71. *Marshall* v. *Knox*, 8 N. B. R., 97.

In re The McDermott Patent Bolt Manufacturing Company.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

Petition not to be filed where name of judge is incorrect

Mr. Cutting, on behalf of some counsel in New York, asked leave to present a petition in an involuntary case. It appeared, however, that the petition was addressed to the "Hon. *Nye* K. Hall, District Judge, etc.," and after some argument the permission to file was denied; it being held that if the name of the judge were given at all it must be correct, and that it could not be stricken out as surplusage.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where a Corporation was charged with fraudulently stopping, and not resuming payment within fourteen days, of its commercial paper, consisting of two instruments; one, a promissory note signed by the Secretary and President, reading "on demand, after date, we, The McDermott Patent Bolt Manufacturing Company, promise to pay to the order of John E. Walsh, three hundred dollars at the office of Company, value received," and the other, in form a Due Bill, and reading: "Received, New York, Nov. 7, 1868, from Mr. J. C. Brinck, two hundred dollars for the McDermott Patent Bolt Manufacturing Company, value received, as a loan for their use, the same to be returned, due on demand,"

Held, That the said instruments did not constitute commercial paper within the meaning of the act, and no act of bankruptcy had been committed by failure to pay the same.

To constitute the act of bankruptcy charged, the fraudulent stoppage and non-resumption of payment must be of commercial paper given by the debtor in his character as a merchant or trader.

In re The McDermott Patent Bolt Manufacturing Company.

Blatchford, J.—The alleged act of bankruptcy in this case is, that the company, a corporation, on the 10th of March, 1869, being a merchant and trader, fraudulently stopped or suspended, and did not resume payment of its commercial paper within a period of fourteen days. Such paper consists of two instruments. One is a promissory note dated November 12,

1868, and signed by the president and secretary of the company, and reading as follows:

"On demand, after date, we, The McDermott Patent Bolt Manufacturing Company, promise to pay to the order of John E. Walsh, three hundred dollars at the office of Co., value received." The other is a receipt or due bill signed by the treasurer of the company, and in the words following: "Received, New York, Nov. 7, 1868, from Mr. J. C. Brinck, two hundred dollars, for the McDermott Patent Bolt Manufacturing Company, as a loan for their use, the same to be returned, due on demand."

I do not think, that on the facts proved in this case, either of these instruments can be regarded as "commercial paper" within the meaning of those words in the 39th Section of the Bankruptcy Act.

The consideration of each of them was a loan of money made to the company by the payee named therein. The consideration was unconnected with merchandise, trade, or commerce, or with any mercantile, trading or commercial transaction. The object to which the money borrowed by the company was applied by it cannot affect the character of the instruments given as evidences of the indebtedness, even though it was previously known to the lenders, that the money would be applied to such object. Both of these instruments are payable on demand. The one to Brinck has no feature of negotiability on its face; and, although the note to Walsh is payable to his order, yet in view of the fact that it is made payable on demand, and of the actual consideration for it, its negotiable form is not sufficient to make it commercial paper within the 39th Section. That section requires that the debtor must be a merchant or trader, and must have fraudulently stopped or suspended payment of his commercial paper. This I understand to mean a fraudulent stoppage or suspension of payment of commercial paper given by him in his character as a merchant or trader.

The note to Walsh and the due bill to Brinck were not thus given.

The petition must be dismissed, with costs to be paid by the petitioning creditors.

John Todd, for the petitioners.

J. D. Taylor, for the debtors.*

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Bankrupt borrowed two hundred and fifty dollars of G. in October, 1868, without security or date of repayment mentioned, and on December 17, thereafter, borrowed one thousand dollars more, and gave chattel mortgage on his household furniture to secure the repayment thereof, and also of the said two hundred and fifty dollars, which was duly recorded. On the 24th of December, bankrupt petitioned in voluntary bankruptcy, and was thereupon adjudicated bankrupt, and assignee was appointed February 3, 1869. Mortgagee demanded payment on February 5, 1869, and sold and assigned her mortgage to S. on the 8th of February, for twelve hundred and fifty dollars. S. took possession of the mortgaged property, supposed to exceed in value the amount of the mortgage. Assignee in bankruptcy petitioned to have said mortgage set aside as void.

1. *Held*, the mortgage is valid as to the one thousand dollars, it not being shown that the same was not made in good faith.
2. It is valid as to the two hundred and fifty dollars, the mortgagee not having reasonable cause to believe it was made in fraud of any provision of the Bankruptcy Act.
3. The possession by the bankrupt of the mortgaged property was, after the appointment of the assignee, the possession of the assignee, and its removal by the mortgagee without assignee's knowledge or consent, was unlawful.
4. The mortgagee must surrender the property in specie to the assignee in bankruptcy, to be sold by him to the best advantage of all interested; if not possible so to surrender it, the mortgagee must account to the assignee for the value of the mortgaged property at the time when taken, the proceeds to be applied to the payment of the mortgage, and the surplus, if any, be disposed of as assets.

In re ISRAEL M. ROSENBERG.

BLATCHFORD, J.—The bankrupt filed his voluntary petition

* For definition of commercial paper, see *In re* Nickodemus, 3 N. B. R., , *octavo*. *In re* Hollis, *Idem*, , *octavo*. *In re* Chandler, 4 N. B. R., , *octavo*. *In re* Stevens, 5 N. B. R., 112. *In re* Carter, 6 N. B. R., 299. *In re* Kenyon & Fenton, 6 N. B. R., 288. *In re* Hercules Ins. Co., 6 N. B. R., 338. *In re* Clemens, 8 N. B. R., 279.

in bankruptcy in this court on the 24th of December, 1868; Horace Bedell was appointed his assignee on the 3d of February, 1869. In October, 1868, Mrs. Adele Gilbert loaned to the bankrupt the sum of two hundred and fifty dollars, no time of repayment being agreed upon. On the 17th of December, 1868, she loaned to the bankrupt the further sum of one thousand dollars, on the security then and there given, of a chattel mortgage then and there executed by the bankrupt to her on certain household furniture of his. The loan of the one thousand dollars was made on the condition that the mortgage should secure the payment not only of the one thousand dollars, but of the two hundred and fifty dollars previously lent. The mortgage was so drawn, and the amount secured by it was made payable on demand, and it was duly filed in the proper office. On the 5th of February, 1869, the mortgagee demanded payment from the bankrupt of the amount secured by the mortgage. On the 8th of February, 1869, Mrs. Gilbert assigned the mortgage to Joseph A. Salomon, and Salomon then and there paid to her as the consideration therefor, the sum of twelve hundred and fifty dollars. Subsequently Salomon obtained possession of the mortgaged property, it having been removed from the possession of the bankrupt without the consent or knowledge of the assignee in bankruptcy. What has since become of the property does not appear. The assignee in bankruptcy now presents a petition to this court, claiming that the mortgage is void, as to the creditors of the bankrupt, and praying that it may be set aside as fraudulent and void, and that the property may be put into his possession, and be sold for the benefit of the creditors of the bankrupt. Mrs. Gilbert and Salomon and the bankrupt have appeared and answered the petition, and proofs have been taken on a reference for that purpose.

The mortgage to Mrs. Gilbert, so far as concerns one thousand dollars of the amount secured by it, is not shown not to have been made in good faith. It was made for a then present consideration of one thousand dollars loaned, and was given as security for the debt thus created, and was in all respects other-

wise valid, and was recorded pursuant to the statute of the State of New York. It must, therefore, under the 14th Section of the Bankruptcy Act, be held to be a valid mortgage as against the assignee in bankruptcy, so far as one thousand dollars of the amount secured by it is concerned. As to the two hundred and fifty dollars covered by the mortgage, I think the evidence fails to show that Mrs. Gilbert had reasonable cause to believe, when she received the mortgage, that it was made in fraud of any provision of the Bankruptcy Act. It must, therefore, stand as a valid mortgage for the whole amount secured by it. But, while the amount secured by the mortgage must be paid out of the proceeds of the property, if they are sufficient for that purpose, the property itself must be sold in such manner as to realize the largest possible amount. It passed to the assignee in bankruptcy, and the title to it vested in him as of the 24th of December, 1868. The debt was not demanded from the bankrupt, nor was any action taken by the mortgagee to disturb the status of the property until after the assignee was appointed. From the time of the filing of the bankrupt's petition, the property was in the custody of the court, and at least from the time of the appointment of the assignee, the possession of it by the bankrupt was, in law, the possession of it by the assignee. The taking of any of it under the mortgage was, after that time, unlawful, and the taking of it from the custody of this court and of an officer thereof a contempt of this court. Its value must be accounted for as of the time it was taken. It appears by the bankrupt's schedules, that the value of the property exceeds the amount of the mortgage. The assignee in bankruptcy has a right to sell the property if it can be restored to him *in specie*, and retain the surplus of its proceeds after paying the mortgage. If it or any part of it shall not be restored to him, the defendants concerned in taking it, or such part of it, must account to the assignee in bankruptcy for its value, or for the value of such part of it, as of the time it was taken. If a reference is necessary to ascertain such value, it must be had to the Register in charge of the case. When his report thereon shall be made, the court

will make such order as shall be proper as to the payment of the mortgage.

T. Burwell, for the assignee in bankruptcy.

M. J. Friedlander, for the defendants.*

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Assignee in bankruptcy petitioned to have an assignment of merchandise by the bankrupt to one K., and a transfer of goods to a firm, S. & Co., set aside as fraudulent preferences. Personal service of notice to appear and show cause against granting the petition was made upon K. and S. & Co., in Illinois, where they resided. On the appointed day the parties, by their respective attorneys, entered and filed notice of appearance, and time was given by the court for them to answer. The attorney for S. & Co. thereafter put in an answer, denying the transfer of goods as alleged, and the attorney of K. sought by notice in writing, filed with the clerk, to withdraw his appearance as having been made by mistake.

Held, 1. The question as to the assignee in such a case proceeding by bill in equity or in a summary way by petition, is one as to form, which the adverse party, in court by personal service of notice to appear, or by voluntary appearance, may raise or waive as he chooses. He will be held to waive any objection if he does not raise the question by demurrer or answer within a proper time.

2. The court has jurisdiction of the parties in this case under Section 1 of the Bankruptcy Act, no objection thereto having been made in the proper manner, or at the proper time.

3. K., having once regularly appeared by attorney, cannot withdraw such appearance unless by consent of the court, or of the prosecuting party.

In re Isaac Ulrich *and others.*

Blatchford, J.—The prayer of the petition of the assignee in bankruptcy in this matter is, that an assignment alleged to have been made by the bankrupts to one Gustav Kaufman, on the 11th of January, 1869, two months and sixteen days before the adjudication of bankruptcy herein, and when the bankrupts were insolvent, of certain goods, wares, and merchandise, with intent to give a preference to certain of their creditors, and a transfer alleged to have been made by the bankrupts, when insolvent, to the firm of Steiner & Brother, at the same time, of

* *In re* Holland, 8 N. B. R., 79. *Tiffany, Trustee*, v. *Boatman Saving Inst.*, 9 N. B. R., 245. *Wilson* v. *City Bank St. Paul, Idem*, 97.

certain goods and merchandise, with intent to give a preference to Steiner & Brother, as creditors, Kaufman and Steiner & Brother having reasonable cause to believe that the bankrupts were insolvent, and that the assignment and transfer were made in fraud of the Bankruptcy Act, and to prevent the property from being distributed thereunder, and to defeat the provisions thereof, may be adjudged void; and that so much of the property as is not excepted from the operations of the act, may be delivered to the petitioner as assignee.

Kaufman and Steiner & Brother having been personally served at Peoria, Illinois, on the 6th of July, 1869, with an order made by this court on the 25th of June, 1869, requiring them to show cause before this court on the 15th of July, 1869, why the prayer of the petition should not be granted, appeared in this court on the last-named day, on the return of the order, each by a separate attorney of this court, and a written appearance for each, by his attorney, entitled in this matter, was on that day entered and filed with the clerk of this court, the notices of appearance so filed being each of them addressed to the clerk of the court, and to the attorney for the petitioner in said petition. The matter then stood over for the parties so appearing to answer the petition. On the 29th of July, Steiner & Brother put in an answer, denying the receipt by them of any property on account of the bankrupts, in receipt of any indebtedness of the bankrupts to them. On the same day the attorney who had appeared for Kaufman, filed in the office of the clerk of this court a paper entitled in this matter and signed by himself, but not addressed to any person, and reading as follows: "I hereby withdraw my appearance in behalf of Gustav Kaufman in the above-entitled matter, the same having been made by mistake." Kaufman has put in no answer to the petition, and claims that his appearance has been legally and properly withdrawn, and that this court has now no jurisdiction over him, and that the service on him in Illinois of the order issued by this court was of no avail to confer jurisdiction over his person in this court.

There can be no doubt that this court has jurisdiction, by

virtue of the 1st Section of the Bankruptcy Act, to adjudicate in regard to the matters set up in the petition in respect to both of the adverse parties, provided it obtains jurisdiction over their persons. The bankruptcy proceeding was instituted in and is pending in this court. The object of the petition by the assignee is to collect assets of the bankrupt and to ascertain and liquidate liens and specified claims on such assets. The jurisdiction of this court in such a case, under the first section of the act, is established by the decision of the Circuit Court for this district, in the matter of the New York Kerosene Oil Company (*ante*, p. 125). The question whether such jurisdiction shall be exercised in a plenary suit commenced by bill in equity, or in an informal and summary way, by a petition filed as a part of the case in bankruptcy, the adverse party being brought into court by personal service or by voluntary appearance, is one which such adverse party may raise, if he chooses, or may waive. It is a question as to the form of proceeding, and not one which affects the jurisdiction of the court as to the subject-matter of the controversy, provided the adverse party is brought into court or comes into court personally, in a proper manner. If such party, when so in court, does not raise by demurrer or *quasi* demurrer, or by answer, any objection to the method of proceeding by petition, he must be held to waive such objection. The objection must be taken in season, and it comes too late if not taken by pleading to the petition, or before the time for pleading to it has expired. I do not regard the decision of the Circuit Court in the matter of the New York Kerosene Oil Company as inconsistent with this view or as covering this point. In that case the objection to the proceeding by petition was taken at the time the court made an order requiring the party to answer the petition. In the present case the two adverse parties were required, by the order of this court, served upon them personally, to show cause on the 15th of July, 1869, before this court, why the relief asked for in the petition should not be granted. Both of them appeared on that day by attorney in the manner before mentioned. Time was given to them until the 29th of July to answer the petition. Steiner

& Brother answered it, setting up the defense before mentioned, but taking no objection to the form of procedure. Kaufman put in no demurrer, plea, or answer, and voluntarily suffered his time to do so to expire. He contented himself with putting on the files of the court, on the adjourned day, the attempted withdrawal of his appearance before referred to. This court cannot recognize such withdrawal as of any avail. The appearance was by a notice signed by an attorney of this court and placed on the files thereof, and addressed to the clerk and to the attorney for the petitioner, and entitled in this matter, and using this language: "Take notice, that I hereby appear for Gustav Kaufman in the above matter." This appearance would have been effective to confer jurisdiction over Kaufman in this matter if there had been no previous service on him of any order to show cause. The appearance was thus effective, without reference to the question whether or not, without it, the service of such order in Illinois would have been ineffectual to confer such jurisdiction. The object of process in a suit *in personam* is, to secure the appearance of the party, and his general appearance waives all irregularities in the service of such process, and confers jurisdiction so far as the person is concerned. That jurisdiction, when thus once conferred, cannot be withdrawn by the act of the party who has so appeared, without the consent of the court or of the prosecuting party. No such consent has been given or applied for in this case. The allegation by the attorney, in the notice of withdrawal, that the appearance was put in by mistake, and that it is withdrawn for that reason, is of no avail. It is not stated whether the mistake was one of law or one of fact. If it was one of law, the party making it must abide its consequences. If it was one of fact, the court must pass upon the existence and pertinence of the fact and allow the withdrawal, on previous notice to the prosecuting party. It is clear, therefore, that this Court has jurisdiction over Kaufman, by his appearance; that his withdrawal of appearance is unavailing; that he has waived all objection to the form of proceeding; that the court has jurisdiction of the subject-matter of the petition, and that

the petitioner is entitled to a decree against Kaufman for the relief prayed for. This court has jurisdiction, also, over Steiner & Brother, by their appearance and answer, and they have waived all objection to the proceeding by petition. A reference must be had to take testimony as to the issue raised by such answer.

A. R. Dyett & B. C. Thayer for the petitioners.

J. B. Bullock for Kaufman.

Kaufman, Frank & Wilcoxson for Steiner & Brother.*

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where counsel for involuntary bankrupt petitioned the court for an order to be paid counsel fees and expenses out of the assets in the hands of the assignee, the bankrupt not having the means therefor, and the services rendered being in the preservation of the bankrupt estate for the assignee in bankruptcy—

Held, such order would be made upon the assignee approving in writing the payment of the counsel's bill.

In re HENRY B. MONTGOMERY.

To the Hon. SAMUEL BLATCHFORD, District Judge of the District Court for the Southern District of New York.

The petition of Jas. B. Olney, attorney and counsellor at law, shows that a petition in bankruptcy was filed in this court against Henry B. Montgomery, claiming that said Montgomery, by a sale to Baldwin Griffin, violated provisions of the Bankrupt Act, and asked that he be adjudicated a bankrupt.

Your petitioner further shows that Henry B. Montgomery and Sylvester B. Sage were co-partners, and in 1868, Sage sold out to Montgomery, and the firm was dissolved; but the partnership was in fact insolvent on the last days of December,

* See cases cited in note to Kerosene Oil Company, *ante*, , as to mode of applying to set aside fraudulent conveyances, and *Mitchell* v. *McKibbin*, 8 N. B. R., 548.

1868. Sage was declared bankrupt. Montgomery sold his property, real and personal, to his father, Thomas Montgomery, and Baldwin Griffin, his brother-in-law, to secure them for moneys advanced to him by them. It was of this transfer that Montgomery's creditors complained, and a petition was filed in this court as aforesaid.

Your petitioner further shows that by his counsel and advice all the property transferred by said Montgomery to his father and Griffin, both real and personal, was at once surrendered, given up, and transferred to the assignee without any trouble, expense, or hindrance on the part of the bankrupt or his friends, and the assignee has taken possession of the same and turned the same into money, and realized from the sale thereof some six thousand dollars, as your petitioner is informed and believes true, and the said amount is now in his hands awaiting distribution.

Your petitioner further shows that said bankrupt has voluntarily surrendered all his property to the said assignee, and that he is to-day not worth one dollar, and has no means with which to pay the petitioner's fees and expenses as counsel, and which services are rendered necessary therein; and that by reason of the counsel, advice, services, fees, and expenses so made and incurred, and rendered by said petitioner to and for said Montgomery, as stated in the schedule hereto annexed, there has been actually saved to said estate and the creditors the sum of five hundred dollars, and your petitioner will go unpaid and unrewarded for his services and expenses, unless the same be paid out of the moneys in the hands of the assignee.

Your petitioner further says that the services and expenses set forth in the annexed bill are true and correct, and the charges reasonable, and that your petitioner has had no pay therefor.

Your petitioner, therefore, asks that an order may be granted allowing to him the amount of said bill from the moneys in the hands of the assignee.

Jas. B. Olney.

Sedgwick, Assignee, v. Place et al.

Estate of H. B. Montgomery,

To JAS. B. OLNEY, Dr.

February 20, 1869.—To services at New York two days from Catskill, on order to show cause why decree of bankruptcy should not be made, before the United States District Court	$40 00
Expenses	18 60
Services making and copying inventory and schedules for Montgomery, two days	20 00
Cash paid for blanks	2 60
Services on first meeting in preparing papers bankrupt	10 00
Services at subsequent times, and attendance before Register for Montgomery, and counsel	80 00
Services rendered otherwise in bankrupt proceedings	15 00
August 17.—Services before the Register on behalf of Montgomery	20 00
	$156 20

UNITED STATES DISTRICT COURT—SOUTHERN DISTRICT OF NEW YORK.

In re Henry B. Montgomery.

Before Mr. Theodore B. Gates, Register in Bankruptcy.

I think that the services and advice of Mr. Olney has saved the estate in the above matter considerable expense, and expedited the conversion of the estate into money, and, if consistent with the practice in like cases, I would recommend the payment of the above bill out of funds in the hands of assignee.

THEODORE B. GATES, *Register.*

BLATCHFORD, J.—If the assignee shall in writing approve of the payment of this bill out of the funds of the estate, on the grounds set forth in the petition of Mr. Olney, and in the certificate of the Register, and of the amount of the charges, an order will be made allowing its payment.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Assignee in bankruptcy filed bill to set aside as null and void a voluntary assignment for benefit of creditors, made by bankrupts, and pending the suit moved that a receiver be appointed. The voluntary assignees

had given security by order of State court for the faithful performance of their duties, but had been enjoined from action in the premises by the Bankruptcy Court.

Held, That it was a proper case for the appointment of a receiver, and one would be appointed.

JOHN SEDGWICK, *as Assignee in Bankruptcy of* JAMES K. PLACE & JAMES D. SPARKMAN *v.* JAMES K. PLACE *and others.*

BLATCHFORD, J.—The main object of the bill in this case, is to set aside as null and void an assignment made by the bankrupts, when insolvent, on the 23d of December, 1867, to the defendants, Lewis W. Burritt, Jr., and Thomas T. Sheffield, of all their property, joint and several, in trust to convert it into money, and therewith to pay the joint and several debts of the assignors, without preference or priority, except as provided by the laws of the State of New York, and of the United States, and also to obtain a decree that certain property which the bill alleges was conveyed by the bankrupts, in fraud of their creditors, prior to the making of such assignment, vested in the plaintiff as assignee in bankruptcy, as against the defendants, notwithstanding the execution of the assignment of December 23, 1867. The bill prays for a receiver, pending the suit, of the property transferred to or in the possession of the defendants, and of the proceeds thereof. The bill avers fraud in fact, and makes allegations which, uncontradicted, show that the property in question was assigned and conveyed by the bankrupts in fraud of their creditors, and with intent to hinder, delay, and defraud their creditors. An injunction has been issued by this court in pursuance of the prayer of the bill, restraining the assignors and assignees from disposing of or in any manner interfering with the property or rights of action purporting to be conveyed, created, or affected by the said assignment, and from setting up, or asserting, as against the plaintiff, any title to or right of action for any property conveyed by the bankrupts prior to December 23, 1867, in fraud of their creditors. The plaintiff now moves for the appointment of a receiver. The merits of the case were not discussed on the motion, as the time for the defendants to put in their answers to the bill had not expired, and they were not held

to deny by affidavit the allegations of fact in the bill. The only question argued was, whether, in view of the injunction issued by the court, and the status of the property in the hands of Burritt and Sheffield (the voluntary assignees) the safety of such property and the interest of the parties—whoever in the end might be entitled to it—required that a receiver should be appointed. The voluntary assignees produced a statement of the present condition, in their hands, of the property assigned to them, and showed that they had, in pursuance of an order of a State court of New York, under a statute of that State, given security for the performance of their trust as assignees, in the sum of three hundred and twenty thousand dollars. The plaintiff showed, by his affidavit, that there is in the hands of Francis Skiddy, as assignee in bankruptcy of the Place Sugar Refinery, a large sum of money, consisting of dividends upon an indebtedness due from the Place Sugar Refinery to the bankrupts, and that the payment of such dividends is withheld by said Skiddy, on account of the conflicting claims thereto of, the plaintiff, and the defendants Burritt & Sheffield; and also, that George F. Gilman was indebted to the bankrupts in the sum of from fifteen to twenty thousand dollars, payment of which he has withheld on account of such conflict; and that he, the plaintiff, believes that the estate of the bankrupts will suffer loss and depreciation unless a receiver is appointed to collect the said and other demands. The statement produced by the voluntary assignees shows that the property in their hands consists of fifty-five thousand dollars of cash, in currency, which is deposited with the United States Trust Company, on interest; forty thousand dollars cash, in currency, loaned to Gibson, Beadleston & Co., of New York, on forty thousand dollars of United States Bonds, which are deposited with the Long Island Safe Deposit Co., of Brooklyn; twelve thousand five hundred and ten dollars and two cents of cash, in currency, which is loaned temporarily on notes secured by deposit of merchandise; six thousand seven hundred and eighteen dollars and fifty-five cents cash, in gold, on special deposit in bank; fourteen hundred and sixty-

three bags and packages of coffee, stored in New York and Salem, valued at fourteen thousand two hundred and twenty-two dollars and eleven cents, gold; nine hundred and twenty-two packages and bags of ginger, stored in New York, valued at six thousand six hundred and fifty-eight dollars and twelve cents, gold; one hundred and fifty-seven half chests of tea, valued at three thousand two hundred and eighty dollars and fifty-five cents, gold; sundry shares of bank stock and insurance company scrip, valued at seventeen thousand eight hundred and twenty dollars; the claim against the Place Sugar Refinery, amounting to fifty-six thousand eight hundred and seven dollars and twenty-eight cents; the claim against Gilman, amounting to fifteen thousand six hundred and eighty-two dollars and forty-five cents; eighty-four thousand five hundred and seventy dollars and three cents of debts due, in currency, put down as worthless; twenty-three thousand five hundred and sixty-three dollars and ninety-nine cents of debts due, in currency, put down as doubtful or disputed; fifty-five thousand six hundred and seventy dollars and ninety-three cents of debts due, in gold, put down as doubtful or disputed; thirty-one thousand eight hundred and eleven dollars and ninety cents of debts due, in currency, put down as due from debtors who have gone into bankruptcy, other than the debt due from the Place Sugar Refinery; two hundred and one dollars and seventy-five cents due, in gold, from a debtor who has gone into bankruptcy; fifty-four thousand nine hundred and eighty-three dollars and eighty-two cents of debts due, in currency, other than the debt from Gilman; and three thousand four hundred and sixty-six dollars and seventy-five cents due, in gold, which are not put down under any one of the above heads; four hundred and fifty-five dollars of the fifty-four thousand nine hundred and eighty-three dollars and eighty-two cents, being stated to be secured, one thousand and ninety-two dollars and sixty-one cents of the same being stated to be in the hands of attorneys, for collection; three thousand nine hundred and twenty-nine dollars and thirty-one cents of the twenty-three thousand five hundred and sixty-three dollars

and ninety-nine cents being stated to be in suit, and the amount due from Gilman being stated to have been ordered by a State court of New York to be deposited in such court in a suit brought against Gilman by the said voluntary assignees to recover the amount. The above are assets of both of the bankrupts jointly. In addition, there are in the hands of the voluntary assignees, assets of the bankrupt Place, individually, to the nominal amount of five thousand four hundred and twenty dollars and seventy-five cents, and assets of the bankrupt Sparkman to the nominal amount of seventy-nine thousand and fifteen dollars and sixty-two cents.

On the foregoing facts it is apparent that the appointment of a receiver is not only proper but necessary. By the injunction granted by this court, on the bill, and which the defendants have not moved to vacate or modify, the voluntary assignees are restrained from in any manner interfering with the property in question. They, therefore, cannot lawfully collect any of the debts or realize any of the assets, nor can they meddle with the property even to secure it from loss. The fact that they have loaned a portion of the money in their hands on notes secured by a deposit of merchandise, shows that they are improper custodians of trust money. No trustee has a right to make such an investment of trust funds. The security which they have given under the law of New York is not available in this court, and notwithstanding the injunction, they have full power over the funds and property in their hands. A receiver who will represent the conflicting titles to the property ought to be put into possession of it, that he may effectually collect all the debts which are collectible, and sell, if necessary, with a clear title, the merchandise on hand. The receivership ought to be extended over all the moneys and property named in the statement of the voluntary assignees, as well as the money on deposit in the United States Trust Company, as the other money and property. The fifty-two thousand five hundred and ten dollars and two cents loaned ought to be called in, and be, with the fifty-five thousand dollars, and the six thousand seven hundred and eighteen dollars and fifty-five cents gold, deposited in

the United States Trust Company by the receiver, to the credit of this cause, on interest, subject only to the order of this court. As to the residue of the property, the receiver must give adequate security in an amount to be fixed on notice to all parties, for the faithful discharge of his duties, and he must be required to deposit his collections in the United States Trust Company, on interest, as fast as they reach an amount to be fixed in the order. The appointment of the plaintiff as receiver is asked for by creditors of the bankrupts of high business standing and worth, and he will, accordingly, be appointed.

F. N. Bangs, for the plaintiff.

W. M. Evarts, *T. C. T. Buckley*, and *A. H. Wallis*, for the defendants.*

UNITED STATES DISTRICT COURT—WISCONSIN.

A single creditor whose debt is secured by a lien on lands of greater value than the amount of his debt will not be permitted to abandon all remedies open to him for the collection of his debt, and use the Bankruptcy Court for the purpose.

A judgment creditor cannot claim a jurisdiction of the Bankruptcy Court for the collection of his debt, fully secured by the only lien on real estate.

In re AVERY *v.* JOHANN.

MILLER, J.—On the 15th day of September, 1856, Nicholas Johann made his note to the Milwaukee and Lake Superior Railroad Company, payable on the 1st day of July, 1866, with his mortgage on a tract of land as security. The petitioner having become the assignee of the note and mortgage, on the 26th day of September, 1866, instituted proceedings in a court of this State to foreclose the mortgage. In the month of December following, a judgment for the sale of the mortgaged premises was rendered, with an order for execution for the residue of the debt against other property of the debtor. The mortgaged premises being encumbered with taxes and tax titles,

* See also 6 N. B. R., 465, and 552, and 7 N. B. R., 145. As to the rights of a receiver beyond the jurisdiction in which he was appointed, see *in re* Republic Insurance Company, 8 N. B. R., 197.

the proceeds of sale were inconsiderable, when the amount of the residue of the debt was certified and transferred to the judgment record, pursuant to a law of the State. The petition in bankruptcy is founded on this judgment. It represents as the cause of bankruptcy, that on the 15th day of October, 1868, Nicholas Johann, the debtor, fraudulently conveyed to his two sons all his estate, lands, and tenements, describing them, with intent to hinder and delay this petitioner in the collection of his said debt. The conveyances were exhibited at the hearing. The debtor claims no property except such as is embraced within the exemption laws of the State. No other debt was alleged or proven. The real estate conveyed to his two sons is of greater value than the amount of this debt. Johann is a farmer, and not engaged in trade.

There is no doubt but a conveyance by a father to his sons, in consideration of his support, is fraudulent as to his creditors, and would be a cause of bankruptcy at the instance of creditors other than this petitioner. The objects of the Bankruptcy Act are discharge of a debtor from his debts, and an equal distribution of his estate amongst his creditors, in proportion to the amount of their respective debts. This case is not within the scope or intent of the act. There are no creditors to claim distribution of assets. Nor does any creditor allege as cause of bankruptcy those conveyances, but the petitioner, who can enforce the collection of his debt by proceedings in equity in the court where his judgment remains of record. A single creditor, whose debt is secured by a lien on lands of greater value than the amount of his debt, cannot be permitted to abandon all remedies open to him for the collection of his debt, and claim the jurisdiction of this court in bankruptcy for the purpose.

A judgment creditor cannot claim the jurisdiction of the court in bankruptcy for the collection of his debt, fully secured by the only lien on real estate.

It cannot be adjudged that Johann made the conveyance to his sons in contemplation of bankruptcy or insolvency. Nor can I find him to be in a state of insolvency, while it appears

there is property sufficient for the full payment of his only debt, upon the removal of a cloud on the title.

The deeds having been given by the debtor during the pendency of the suit of this petitioner against him should be declared fraudulent, if no legal or equitable consideration therefor be shown in the proper tribunal. Such a decree cannot be claimed upon this petition in bankruptcy. If a question of this character should arise at the instance of an assignee in bankruptcy, I would require him to bring his bill in equity. *Shawhan* v. *Wherritt*, 7 How., 629.

For these reasons, I order the petition dismissed, but without prejudice to proceedings on the judgment.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

Where a creditor, after the filing of the bankrupt's petition, but before the first meeting of the creditors, transfers his debt to another, the debt may be proved by the owner of it at the time of proof, the oath being modified to suit the facts of the case.

Any creditor who has a provable debt may oppose the bankrupt's discharge.

In re GEORGE A. MURDOCK.

LOWELL, J.—An interesting question was raised and argued in this case, whether George W. Ware, Jr., or Elizabeth Ventress, could prove any debt against the estate of this bankrupt, and, if either could do so, whether the debt had been properly proved. Mrs. Ventress is the sister of the bankrupt, and is put down in the schedule as his principal creditor. After the petition was filed, but before the first meeting of creditors, she sold her debt, which was in the form of a negotiable note, to Mr. Ware. The debtor contends that neither can prove any debt against the estate, because neither can take the oath prescribed by Form No. 22, to being a creditor both at the commencement of the proceedings and at the date of the proof. Section 22 of the statute requires every creditor to take an oath that the debt is justly due, etc., and was not procured for the

purpose of influencing the proceedings under the statute, and that no bargain, etc., has been made to transfer the claim, or to receive any money or consideration whereby the vote of the creditor for assignee, or the action of the creditor or of any one else in the proceedings, shall be affected, influenced, or controlled. I do not find anything in this section to avoid a real and honest transfer of a debt without any purpose of influencing the proceedings, but rather an implication that it may be done, if there be no such purpose. And I can conceive of no reason why it should not be. It is true that everything is to be settled as of the commencement of the proceedings, and the rights of the parties are fixed at that time. And, by the express language of the statute, a debtor of the bankrupt cannot buy up a claim against him, after the proceedings are begun, and use it in set-off (Section 20). But a set-off is payment in full of the debt set-off to the extent of the debt against which it is set off; and a creditor who shall obtain payment in full, has an unjust advantage over the rest. But there is nothing that I can discover in the statute or in its policy to restrain the negotiability of debts, or to require an honest debt to be annihilated because it has been honestly transferred, and this must be the result if neither party can take the oath necessary to prove it.

The form of oath prescribed by the Supreme Court does indeed appear to contemplate that there has been no transfer. It is: That the bankrupt was, at the time proceedings were commenced, and still is, justly and truly indebted to the creditor. But this form is made for the most usual cases, and is not intended to change the statute, but may itself be varied to meet the exigency of different cases. Taken literally, it would exclude administrators or other assignees by mere operation of law, which certainly cannot have been the purpose. The oath prescribed by the Massachusetts statute was like that prescribed by the Supreme Court, and I am informed that it was understood to prevent an assignee of any debt from proving it, and that the practice in courts of insolvency was to advise the assignee of a debt to transfer it back to his assignor, who then took the oath and retransferred the debt. This was a circuitous

way of arriving at justice, and I am not aware that the Supreme or Superior Court of the State ever passed upon the necessity of any such action. And, besides, this was a form prescribed by the law itself, which our law, passed later, has not adopted. My own impression is pretty decided that the debt in such case may be proved in bankruptcy by the owner of it, at the time of proof, the oath being modified to suit the facts.

Another point I have often decided, but the decision appears not to have become generally known. I hold that any creditor who has a provable debt may oppose the bankrupt's discharge. In general, no one is a creditor who has not proved his debt; and such an one has no interest in the mode of settling the estate, nor in the dividend, nor in the acts or omissions of any of the parties to the proceedings. But he has an interest in the discharge, because if it is granted he will be barred. He may hold security which is inadequate for his full payment, and yet is not in a condition to be advantageously liquidated; or there may be no dividend expected; or he may have many other good reasons, or reasons which he considers good, for not proving his debt or concerning himself with the proceedings; and yet it may be of the greatest importance to him that the debtor should not receive his certificate. Upon principle, therefore, he ought to be heard on that issue. The statute evidently contemplates it, because it gives every creditor whose debt was provable, whether proved or not, the right to set aside the discharge within two years, on proving fraud, and that he had no knowledge of the fraud until after the discharge was granted. Now, it is very difficult to maintain that the statute debars a creditor from opposing the discharge before it is granted, when it allows him to do so afterwards, upon showing good cause why he did not do it before. I am aware that there are decisions both ways on this point, but my own was earlier than any of them, and I have seen nothing in the decisions opposed to this view which requires me to change it. Of course, the opposing creditor must show, as matter of fact, that he has a debt which is provable, and this will be one of the issues to be tried.

This whole case was heard, and both parties argued the merits, and it is not improper that I should decide them, leaving the first point still open for consideration if it should arise in another case. The allegations of fact are, that the bankrupt willfully omitted from his schedule and concealed from his assignees the equity of redemption of a house and land in Pittsfield, and his interest in a certain promissory note. The house and land were conveyed to the bankrupt's wife in 1856, at a time when he swears he was solvent. It was open and notorious, and well known to his sister, who was his principal creditor. Such a conveyance does not stand on the footing of a mere voluntary conveyance to a stranger or of one made on a secret trust for the grantor. The consideration is a good one and its operation is not secret. No doubt the debtor has always had, and always will have some advantage from this estate, but it would be a perversion of terms to say that there is any concealment about it. Whether the conveyance could be avoided by the assignee is a different question, and depends on facts not fully developed at this hearing. The conveyance, of course, cannot be alleged as a bar to the discharge, because it was made long before the Bankrupt Law was passed. The only question before me is that of concealment, and I do not find that any was practiced. The interest of the debtor in the note, if any, is equitable rather than legal, and I am not satisfied that there was any intentional concealment of it, or any evasion in his conduct, or schedules, or examination. Where property is, in fact, concealed *in specie*, or where the title is concealed by a colorable conveyance, the discharge cannot be granted; but there are many doubtful cases in which justice seems to demand that the assignee should be entitled to try his rights, but in which unfairness on the debtor's part cannot be made out. The assignee in this case has obtained full knowledge of both these interests, and has sold whatever title he has in them; and I do not see that the bankrupt has obstructed him at all in obtaining his full rights, or that he has willfully concealed anything. Discharge granted.

J. S. Abbott, for the opposing creditors.

E. Merwin, for the bankrupt.

UNITED STATES DISTRICT COURT.—MASSACHUSETTS.

1913.N.10

Where a bankrupt transfers his stock and book accounts, in satisfaction of a pre-existing debt, to a creditor who threatened to attach his stock, and break up his business, such a conveyance is a preference under the Bankrupt Law, though made under pressure.

Re CHARLES W. BATCHELDER.

LOWELL, J.—The examination of this bankrupt discloses that about three weeks before he filed his petition, he assigned and transferred his whole stock in trade and book accounts to his father, in satisfaction of a pre-existing debt. He had no other estate or property excepting such as is exempted from the operation of the Bankrupt Law, and he owed a considerable amount of debts. It appears that his father came to his place of business with an officer, and threatened to attach his stock and break up his business, unless he made the conveyance, and it was under this pressure that the act was done.

It is argued that the act was not a preference, because it was not voluntary. I have considered this question before, and am fully satisfied, that under the Bankrupt Act, such a payment does not lose its character of a preference by being made under pressure. The English courts worked out the doctrine of preference from a consideration of the equities of the subject-matter. The word itself was not found in their statutes, but they held that the intent of the law being to distribute the assets equally among all the creditors, no unjust advantage ought to be given to any one creditor. But under their law at the time this subject was given its legal shape, the title of the assignee related back to the act of bankruptcy, and in declaring a trader to be bankrupt by reason of a preference, they necessarily deprived the preferred creditor of his title, and that without hearing him. It became necessary, therefore, to be very cautious not to create acts of bankruptcy which might prejudice honest creditors. A creditor has a right to demand and receive payment of his debt, they said; and from this starting point they arrived at the rule that a payment made

in pursuance of a lawful demand, should not be considered a fraud on the act.

But they never carried this doctrine to the extent of saying that a creditor might lawfully take an assignment of all the property of a trader. On the contrary, that was always and conclusively an act of bankruptcy, from which even pressure could not free it, because it must have been obvious to the creditor at the time, that if he got the whole, no one else could get anything. Accordingly, the English law has two conclusive presumptions. One is, that a trader who conveys his whole property to a pre-existing creditor, must have contemplated a preference of that creditor. And the other, that a debtor who paid an honest debt with a part only of his assets, did not commit a technical fraud which should render the payment void, if the act was done in consequence of threats or demand on the part of the creditor.

Our law adopts neither of these presumptions as conclusive. It defines a preference in the statute itself; or rather, it has language which is inconsistent with the English definition. It makes the intent to prefer or give an advantage to one creditor the important thing; and this may evidently concur with pressure on the part of the creditor. For instance, in the leading case of *Denny* v. *Dana*, 2 Cush., 172, which is more important in construing our statute than the English decisions are, because the statutes are more alike, pressure was not allowed to avail in answer to a manifest preference.

Nor, on the other hand, will the fact that the conveyance was of all the property, necessarily and in all cases show a preference. It is a very important circumstance, and almost decisive; but the presumption is still one of fact, and the question in every case is whether a preference was intended. It would be very difficult to explain so suspicious a fact, but I am not ready to say that there may not arise a case in which it could be explained.

No explanation is made in this case, and the discharge is refused.

The other objection is overruled. It is not right to condemn a trader for not keeping proper books of account with-

out full evidence of the facts, and of their bearing upon the business of the debtor. The books themselves are not produced, and the parol statements are vague and inconclusive.

The case, on this head, is not made out.

J. L. Colby for the opposing creditors.

W. H. Towne for the bankrupt.*

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

It is the practice of this court to order an examination of the bankrupt's wife only when a *prima facie* case is made out by affidavit. The wife may be examined when on reasonable grounds she is suspected of having, or of having had property in her possession, which should have been surrendered to the creditors, or to have participated actively in any other fraud upon the statute.

In re JOSEPH F. GILBERT.

LOWELL, J.—A creditor applies for an order to examine the debtor and his wife. No examination having been had of the bankrupt, it is proper that an order should issue for his appearance before the Register to be examined; and the creditor must notify the assignee of the time and place appointed, and the assignee will notify any other creditors whom he may have reason to think desire to examine the bankrupt; and the parties interested may pursue all proper inquiries, under the direction of the Register, until the investigation is fully made. Neither the assignee nor any other creditor will be entitled to a second order for examination, excepting on notice and cause shown. This practice was early established in this court by a rule.

With regard to the wife's examination, my practice is to order it only when a *prima facie* case is made out by affidavit. And such a case is not made out by showing that the bankrupt has committed frauds of which the wife is probably cognizant.

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* See *Wilson* v. *City Bank of St. Paul*, 9 N. B. R., 97, requiring *intent* to prefer to be shown.

It is not, in my judgment, the intention of the statute to destroy the usual and proper confidence between husband and wife, any more than that between attorney and client. The cases in which the wife can be examined, are where she is, on reasonable grounds, suspected of having, or of having had property in her possession which should have been surrendered to the creditors, or to have participated actively in other fraud upon the statute. In that case conversations may be of the *res gestæ*, and may be inquired into. She is a party to a fraud, and may be fully examined concerning it. It is not convenient, however, to have a hearing on these questions beforehand, and I have abandoned the practice of giving notice to the wife before the order was issued, because I found a hearing leads to nothing; for if there is a *prima facie* case made out, the examination alone can settle whether there is any good answer to it. When, therefore, such a case is presented by affidavit, I order the examination and direct the subjects to which it shall extend, and if any questions are asked which are thought to go beyond the rule, the answers may be made subject to objection.

This application presents one of the cases in which the wife may be examined. It shows that she professes to be a creditor of her husband's estate. If so, and if she offers her debt for proof, she can be fully examined in regard to it, like any other person under like circumstances.

UNITED STATES DISTRICT COURT—S. D. GEORGIA.

A father, resident of Georgia, bequeathed lands therein to the husband of his daughter, in trust "for her sole and separate use, during her natural life, and the use of her children," with limitation over on her death to her then husband and children living, share and share alike, with a clause that no part of the property should be liable for the debts of any present or future husband. The wife having died and the husband become bankrupt,

Held, he took, under the laws of Georgia, on her death, a fourth interest in fee in the said lands.

The clause against the use of any part of the lands in payment of debts of

husband, applied during the life of the wife only, and does not apply after the fee vested in the husband.

In re BENJAMIN H. MYRICK.

BENJAMIN H. MYRICK filed his petition in bankruptcy February 10, 1868. At that time and for some years before, he was in possession of, besides other lands, four hundred and sixty-five and a half acres—being two tracts or parcels put together—the one, the "Greene Place," two hundred and sixty-three acres, the other, the "Britt Place," two hundred and two and a half acres, making in all four hundred and sixty-five and a half acres. He acquired the Greene Place directly by the will of John Edmondson, deceased; and the Britt Place was bought by him under the instructions of the will, and paid for with money which came to him by the will; and the question now under consideration is, did that land or any part of it, at the time of his bankruptcy, belong to Benjamin H. Myrick, so as to be liable as assets in the hands of the assignee? In other words: did Benjamin H. Myrick, at the time of his bankruptcy, possess such an interest in the land as should, under the law, pass to his assignee for the benefit of his creditors, and if so, what interest?

In order to determine this question, it is necessary to recur to the will of John Edmondson, who was the father-in-law of Myrick, and give it a legal construction in so far as it relates to this property. The clause of the will relating to this property, and the terms and conditions of its bequest, reads as follows, to wit:

"All of which property, together with all that which my said daughter may receive according to my will, I give to Benjamin Myrick to hold in trust for the sole and separate use of my said daughter, Mary Ann, during her natural life, and for the use of her children; and at her death, the said property to be equally divided between the children she may have living, and the descendants of such as may be dead, and her then husband, share and share alike. And said property to be in no wise liable to the payment of the debts of any present or future husband."

In re Myrick.

Mrs. Mary Ann Myrick died some time previous to Mr. Myrick's bankruptcy, leaving three children and Mr. Myrick, as her then husband.

OPINION OF THE REGISTER.

The general rule for construing a will is, to give it such construction as will carry into effect, if possible, the intention of the testator. But, at the same time we take *intention* as the guide, we must not suffer a departure from the legal restrictions thrown over the making of wills by legislation, to lead to a conclusion that will violate the law—always presuming that the intention of a testator is to conform to the law.

It is clear, from the provisions of the will, that Benjamin H. Myrick held the property in trust during the lifetime of Mrs. Mary Ann Myrick, his wife. All must admit this. But, what was the condition of the property after her death? The will provides, that on the happening of that event, the property should be equally divided between the children she then had, and her then husband, viz.: three children and Benjamin H. Myrick, share and share alike. If it were at all doubtful whether the testator intended that the trust estate should then end, the law settles the question. The legislature of Georgia has enacted (Code of Georgia, Section 2230), "that limitations which, by the English rules of construction, would create an estate tail by implication in this State, shall give a life estate to the first taker, with remainder over in fee to the * * * beneficiaries intended by the maker of the instrument."

Thus Mrs. Mary Ann Myrick was the first taker, and took a life estate in trust in the property bequeathed. But at her death, the law vested an absolute title in fee in the three children and Benjamin H. Myrick, share and share alike. Consequently, Benjamin H. Myrick, at the time of his bankruptcy, was the owner in fee of one-fourth interest in the four hundred and sixty-five and a half acres of land, and that interest is assets which passed to the assignee. The clause of the will which says: "Said property to be in no wise liable to the payment of the debts of any present or future husband," must be con-

strued to be limited by and to apply only during the life of Mrs. Mary Ann Myrick. It cannot apply after the property has vested in fee.

ALEXANDER G. MURRAY,
Register.

ERSKINE, J.—After careful consideration of the question certified for the approval or disapproval of the judge, he is of opinion that the decision of the Register is correct, and it is approved.

UNITED STATES DISTRICT COURT—S. D. GEORGIA.

A power to represent a creditor in bankruptcy is not subject to stamp duty by existing laws.
A creditor may correct clerical errors in his proof of claim at any time before final dividend.

In re BENJAMIN H. MYRICK.

At the second general meeting of the creditors of Benjamin H. Myrick, bankrupt, on the 16th day of February, 1869, the assignee, in the absence of a majority of the creditors, determined on a dividend; and preparatory to computing the same, William McKinley, attorney for John Wood, a junior creditor, objected to the proofs of debt filed in favor of David Bateman and George L. Denning, respectively, and moved that they be rejected as *not duly proved*, because the proofs had been made by Lucilius H. Briscoe, under powers of attorney which were void for the want of the proper revenue stamps. To remedy the defect, if defect it was, Col. Briscoe moved to affix the proper stamps instanter; but contended that the law did not require a stamp at the date of the powers. Col. Briscoe also moved to fill two blanks that were not filled at the execution of one of the proofs. This proof had been made out on a printed blank, and the blank place left for the name of the county of his residence, and also the name of the agent proving the claim, had been omitted in one place only, but appeared in

every other proper place throughout the proof. The motion to fill these two blanks was resisted by Col. McKinley.

OPINION OF THE REGISTER.

The revenue laws of the United States, prior to March, 1867, did require such papers to be stamped; but since the removal of stamp duty from judicial proceedings by Congress, in March, 1867, a power to represent a creditor in bankruptcy (being a paper which is part and parcel of bankrupt proceedings, and is required to be filed in the case as part of the record), dated in October, 1868, does not require a stamp.

As to the right to remedy technical errors or omissions, or correct clerical errors, the law gives a creditor the right to prove his claim *at any time* after the commencement of proceedings, and before final dividend; and so long as the right to prove continues, the right to correct a clerical omission in a proof filed should not be denied. If a proof on file were totally defective, the party would have the right to file anew. The just and fair distribution of the assets of a bankrupt according to law, should not be defeated on mere technicalities.

ALEXANDER G. MURRAY,
Register.

ERSKINE, J.—I have carefully examined the matter certified for review in the case of Benjamin H. Myrick, and I am of the opinion that the decision of the Register is correct, and I approve it. The clerk will certify the same to Register Murray.

UNITED STATES DISTRICT COURT—S. D. GEORGIA.

Where bankrupt, residing in Georgia, rented a house, hired servants, and made his home therein with a widow not related by blood to him, but whom he and his wife had educated and regarded as their adopted daughter, but had failed to adopt her in accordance with law,

Held, that he is head of a family, and entitled to exemption as such of fifty acres of land as a homestead, but is not entitled to five acres additional

for each of three children of the widow residing with them, and forming part of the household, inasmuch as he is not legally bound to support them.

In re WILLIAM TAYLOR.

YEARS ago Dr. William Taylor and his wife had one child, and never had any more. A sister of Mrs. Taylor, on her dying bed, and as a parting request, asked Mrs. Taylor to take her infant and raise it for her. Mrs. Taylor, by consent of her husband, Dr. Taylor, took her sister's child, thus left an orphan (mother and father both being dead), to her home, and treated it in all respects as one of her own. Dr. Taylor's own child died, and then the orphan was the only child in the family. Dr. Taylor and his wife doated on the child, gave her a good education, and reared her in all respects as they would have reared a child of their own. In fact, they regarded her as an adopted child, but never by any legislative or judicial act adopted her so as to make her a legal heir.

In process of time Mrs. Taylor died, and the child they had reared from her infancy became Mrs. Carswell. Mrs. Carswell always regarded Dr. Taylor as a father, and he regarded her as a daughter.

Col. Carswell, in 1867, resided in a rented house in Irwinton. In the fall of that year he was taken sick, and lingering till February, 1868, he died, leaving Mrs. Carswell a widow with three children. The rent of the house having expired with the year 1867, Dr. Taylor came in immediately on the death of Col. Carswell, re-rented the house, hired the necessary servants for the comfort and convenience of Mrs. Carswell and children, and made that his home.

The plantation of Dr. Taylor is in the fork of Commissioner's Creek and Oconee River, and being nearly surrounded by swamp, is considered an unhealthy location for a residence. This is the only real estate he owned at the time of filing his petition in bankruptcy.

On the 1st of June, 1868, while thus residing in Irwinton, Mrs. Carswell, her three children, and the hired servants constituting the family, Dr. Taylor filed his petition in bankruptcy.

The assignee, in setting apart the property exempted by law for the use of the bankrupt, included in the exempt list sixty-five acres of land laid out from the plantation; that is to say, fifty acres for Dr. Taylor as head of a family, and five acres additional for each of the three children of Mrs. Carswell. To this exemption by the assignee, Col. Cumming, as counsel for creditors, excepts, and files the following specifications:

First. That Dr. Taylor was not the head of a family, and was not entitled by law to any homestead exemption.

Second. That Mrs. Carswell and her children having already had an exemption out of the estate of Col. N. A. Carswell, have no right to an exemption out of Dr. Taylor's estate.

OPINION OF THE REGISTER.

On the 1st day of June, 1868, Dr. William Taylor, then residing in a house in Irwinton, which he had rented, having as his family Mrs. Carswell, her three children, and two or more hired servants, which were hired by him, and were under his control, was the head of a family; and, as he still continues to so reside, his position as head of a family still continues. As the head of a family, he is entitled to an exemption of fifty acres of land, under the exemption laws of Georgia of force in 1864 (Code of Georgia, Section 2013). To constitute a head of a family, it is not necessary that a man shall have either a wife or child. If he reside in a house of which he is proprietor, and have no other inmates than hired servants, he is in law the head of a family. (See case of *Van Buren Cobb*, 1 N. B. R., 414.) But as Mrs. Carswell and her children are not related by blood to Dr. Taylor, however strong his social relations may be, and with whatever affection he may regard them, he is not *legally* bound to support them, nor can they be regarded as his legal heirs. Hence, he is not entitled to any enlargement of his exemption on account of the three children of Mrs. Carswell.

ALEXANDER G. MURRAY,
Register.

ERSKINE, J.—The decision of Mr. Register Murray is affirmed. The clerk will so certify. *

UNITED STATES DISTRICT COURT—W. D. TEXAS.

Among the costs taxed against a creditor who was unsuccessful in opposing bankrupt's discharge, were charges of five dollars for recording minutes of testimony of an examination of the bankrupt before the Register, before such creditor filed specifications opposing discharge, and ten dollars counsel fee. To both items creditor objected.

Held, the cost of such an examination must be paid to the Register by the party, creditor or assignee, applying for it. Charge disallowed, as improperly taxed in this proceeding. Where a creditor opposes discharge of a bankrupt, a case is created for trial in the court docket, and the counsel fee is allowed as a proper charge.

In re J. D. EIDOM.

DUVAL, D. J.—Peter McGreal, Esq., a creditor of said bankrupt, filed his specifications in opposition to the granting of a discharge to said bankrupt. The case came on to be heard before the court, and a jury impanelled for that purpose, and said specifications having been overruled as insufficient, the case was dismissed and a discharge ordered to issue.

Among the costs taxed against the unsuccessful creditor opposing the discharge, was the sum of five dollars for recording minutes of testimony in the Register's office, and ten dollars as an attorney's fee, which said creditor alleges to be illegal, and moves the court to disallow and expunge.

If I recollect aright, the testimony referred to was that resulting from an examination had of the bankrupt, under oath, before the Register, previous to this creditor filing his objections against the discharge, and which he sought to introduce in evidence to sustain said objections. When a bankrupt is examined at the request of a creditor, the latter should pay the costs of the proceeding; if at the request of the assignee, the costs should come out of the assets of the estate.

* An opposite conclusion was reached in a case under the Texas Law See *ante*.

In either event, it is a matter affecting the Register alone, and he should have provided for the payment of whatever compensation was due him for recording the bankrupt's examination. I am unable, with my present understanding of the matter, to see how it can properly be charged against the creditor, as a part of the costs in this proceeding. It is therefore disallowed.

In regard to the charge of ten dollars, attorney's fee.

The opposition of a creditor to the application of a bankrupt for discharge creates a case for trial on the docket of the District Court, and is accompanied with the usual incidents of such. The opposing creditor becomes plaintiff and the bankrupt defendant, and an attorney's fee becomes a proper charge in the bill of costs.

The fee of ten dollars taxed in this case is therefore allowed.*

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

1. Mrs. Russell, a married woman, carried on, managed, and controlled an iron foundry and other business interests in her own name, with funds loaned her by friends to whom she gave her own notes, with whom she advised as well as with her husband as to proposed investments. The husband, who was insolvent, was hired by the wife, and received a monthly compensation. *Held*, that the property used in the business and that purchased by her and standing in her name, was her individual property, and not liable to be taken to satisfy the claims of her husband's creditors.
2. *Held*, that a married woman may carry on business on her own account and for her own interest; that she may employ all needed labor, workmen, and agents, and that she may employ *her own husband and pay him*.

DRIGGS, *Assignee in bankruptcy of the estate of* GEORGE B. RUSSELL *v.* ANNA E. RUSSELL AND GEORGE B. RUSSELL.

WITHEY, J.—This is an application by the assignee to have property, real and personal, held by Anna E. Russell, turned over to the assignee in bankruptcy for the benefit of George B. Russell's creditors, and is based on the claim that the property

* In re Alfred Jackson, 8 N. B. R., 424.

in question has been acquired in the name of Mrs. Russell, but for her husband's benefit. If the claim is supported by the proofs, then the order to transfer the property to the assignee in bankruptcy should be made; otherwise it should be denied.

We have not time to enter as fully into a discussion of the merits of the question as its importance demands, but we have not failed to examine the facts, and should be glad, if our time permitted, to give in full the views which have led to our conclusion. We shall attempt, therefore, little more than a statement of the result of our examinations.

In all Mrs. Russell's purchases of property, there is no evidence that her husband furnished one dollar of the purchase-money. In her business operations in carrying on the iron foundry and other business interests, there is no evidence that her husband had any *control* whatever, furnished any capital, or dictated in the slightest manner. Mrs. Russell had friends who loaned her money. She advised with friends as to proposed investments, as to business she began and carried on, and she also advised with her husband in reference to these subjects, as she had a right to do. She gave her individual notes for moneys loaned. She pledged property which she had bought, to secure payment. Her husband's name does not appear in any of these transactions.

Mrs. Russell began without means; her husband was a bankrupt without credit, hopelessly insolvent. Her credit was better than his, because she was not involved in debt, and he was. There is no presumption, therefore, that his credit or his means had any influence in promoting her credit or her acquisition of the property or any part of it.

But Russell did work a portion of the time for his wife, and received from her a monthly compensation. How does this fact affect the right of property? How does it show that her acquisitions were for his benefit? Not in the slightest, if a married woman may carry on business on her own account and for her own interest. If she may do this, she may employ all needed labor, workmen, and agents. If she may hire the services of any one at all, she may employ her husband and pay him.

That the husband is primarily bound to support his family, may be conceded; but suppose he cannot, and suppose the wife can, she may do so. But there is nothing in the case to show that Russell did not, through his own earnings, support his family. If it should be established that his earnings went into her property, then he would own an interest in the property. But this fact does not appear.

The petitioner comes and asserts that Russell, and not Mrs. Russell, is the person in whose real interest the property was acquired, that the wife was but a cover, holding it for the husband. The petitioner is bound to establish what he asserts by proofs, before he can ask the court to find that this claim is correct. It is probable the petitioner and his learned counsel commenced these proceedings upon such information as entirely justified not only the claim set up, but afforded great assurance of success. The proofs must, in a great measure, come from Mrs. Russell and Mr. Russell. They were called and examined, and, we think, exhibit great candor, frankness, and truthfulness. The facts taken altogether, as we think, fail to show any interest whatever, in the husband, in any respect, to any of the property in question.

It makes no difference that Russell had failed; it is at most a circumstance which is to be considered in weighing the proofs if, because he could not buy and sell and carry on business, he was using his wife's name as a cover for doing what in his own name he could not successfully do. But, as a circumstance or fact, it amounts to very little in view of the proofs. It is asked if credit would have been given to Mrs. Russell had it not been for the confidence placed by others in her husband's business ability? We can only reply that we think if Russell's business reputation was one of the main inducements for giving his wife credit and loaning her money, such fact ought not to be allowed as affecting her rights to property acquired by means of such credit. She had a right to all the advantage which would or did flow to her from her own or her husband's business tact and foresight, so long as his means, services, and earnings, did not enter into her business.

Mrs. Russell stated that her husband spent more time than she did in her business, but when this statement is considered with reference to all that she states, and the other proofs, it is without any significance. Russell was employed, that is, a portion of the time, to and about Mrs. Russell's business, but she paid him wages regularly, as she paid other employees. Mrs. Russell managed and controlled everything. She was conversant with all her business, and her testimony exhibits business qualities quite equal to those exhibited by successful business men.

In Michigan, the wife may acquire, hold, and own property in her own right, and she may carry on business in her own name. Hence the presumptions are all in her favor on the question of the ownership of this property. The legal title is indisputably in her. She has possession. The proofs do not overcome these presumptions. We cannot take her property and hand it over to her husband's creditors.

We think the authorities cited by counsel sustain us in our conclusions. It may be said we have taken a one-sided view of the facts of this case, failing to discuss fully the proofs which tend to show a different result. We admit this—but our time has not been sufficient to enter upon as full a discussion as we have desired. We have not failed, however, to consider both sides in our investigations, but a desire to dispose of the case now is the excuse for the partial discussion we make in announcing the result.

The application is denied.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

A trader being and knowing himself to be insolvent made an assignment, creating no preferences among his creditors, of all his property, for their benefit. About ten months thereafter he filed voluntary petition in bankruptcy, and his discharge being opposed by creditors on specification that such assignment had been made by him, in contemplation of becoming bankrupt, for the purpose of preventing the distribution of his property under the Bankruptcy Act in satisfaction of his debts,

Held, 1. Bankrupt made such assignment with intent to delay and hindor creditors, and in so contemplating the commission of an act of bank-

ruptcy, denounced by the statute, he acted in contemplation of becoming bankrupt.

2. In so doing he also acted with a purpose to prevent the distribution of his property under the Bankruptcy Act, in seeking to provide for its distribution under the assignment, by an assignee selected by himself.

3. Where the forbidden intent and purpose exist in making such an assignment, it is immaterial what are its terms, or how much or little of the assignee's property it conveys. Discharge refused.

In re ABRAHAM GOLDSCHMIDT.

BLATCHFORD, J.—In this case the discharge of the bankrupt is opposed by creditors on a specification alleging that since the passage of the Bankruptcy Act, the bankrupt has, "in contemplation of becoming bankrupt, made an assignment of all his property to David Heller, for the purpose of preventing the said property from being distributed under said act, in satisfaction of his debts," being the assignment referred to in the schedules annexed to the petition of the bankrupt, as one made by him on the 20th of February, 1868, assigning all his property to Heller, "for the purpose of selling and disposing of the same, and dividing the proceeds thereof, share and share alike, among his several creditors named in schedule A, No. 3 and No. 5, without preference." This specification is founded on that clause of the 29th Section of the act, which provides that no discharge shall be granted to bankrupt if he has, in contemplation of becoming bankrupt, made any assignment of any part of his property for the purpose of preventing the property from being distributed under the act in satisfaction of his debts. Three things must concur, under this provision, to warrant the refusal of a discharge: First, there must have been an assignment of property by the bankrupt; second, he must have made an assignment in contemplation of becoming bankrupt; third, he must have made it for the purpose of preventing the property from being distributed under the act, in satisfaction of his debts.

That the assignment was made in this case is undisputed. It is in writing, and bears date February 19th, 1868, and is executed by the assignor and assignee, and was acknowledged by both of them on that day, and was recorded the next day. It states that the assignor "is justly indebted to sundry persons

in sundry considerable sums of money, and, being unable to pay the same in full, is desirous of making a fair and equitable distribution of his property and effects among his creditors." It then assigns to Heller all the property of the assignor, in trust to sell and dispose of it, and convert it into money, and out of the proceeds, after deducting the expenses of executing the trust, to pay all the debts of the assignor, *pro rata*, without preferences.

The next question is, whether the assignment was made by the assignor in contemplation of becoming bankrupt? What is meant by the expression "in contemplation of becoming bankrupt," as used in this clause of the 29th Section? An examination of the act, in connection with the forms, shows that the expression "becoming bankrupt" means, committing an act of bankruptcy, and that the expression "in contemplation of becoming bankrupt" means, in contemplation of committing an act of bankruptcy. The act of bankruptcy, the commission of which must be contemplated, is such an act as the statute declares to be an act of bankruptcy. By Section 11, the filing of a petition by a debtor, under the conditions therein prescribed, is declared to be an act of bankruptcy. By Section 39, it is provided that a debtor who does any one of certain specified things, shall be deemed to have committed an act of bankruptcy. Form No. 5, being the form for "adjudication of bankruptcy upon debtor's petition," is a finding and certificate by the Register, that the petitioner "has become a bankrupt within the true intent and meaning of the act"—that is, that he has filed a petition as a voluntary bankrupt, under the conditions prescribed in Section 11, and in compliance with the General Orders and the Forms and the Rules of this court. A petition by a creditor, Form No. 54, avers that the debtor "did commit an act of bankruptcy." Form No. 58, which is the form for adjudication of bankruptcy on a creditor's petition, adjudges that the debtor "became bankrupt within the true intent and meaning of the act * * * before the filing of the said petition"—that is, that he so became bankrupt by committing the act of bankruptcy alleged in the petition, being an act, the

doing of which is declared by Section 39 to be the commission of an act of bankruptcy. A debtor may, therefore, become bankrupt or commit an act of bankruptcy, by filing a petition under Section 11, or by doing some one of the things which is declared by Section 39 to be the commission of an act of bankruptcy. The question to be determined in this case is, whether the bankrupt, when he made the assignment to Heller, contemplated filing a petition under Section 11, or contemplated doing some one of the things which is declared by Section 39 to be the commission of an act of bankruptcy. For it is not necessary, in order that he should have contemplated becoming bankrupt, that he should have contemplated having a petition filed against him and being adjudged a bankrupt thereon, provided he contemplated committing an act which is defined by Section 39 to be an act of bankruptcy.

The petition of the bankrupt in this case, in voluntary bankruptcy, under Section 11, was filed on the 28th of December, 1868, ten months and eight days after the recording of the assignment to Heller. There is nothing in the evidence, or in the circumstances of the case, to induce the belief that the bankrupt, when he made the assignment, contemplated filing himself the petition which he afterwards filed, and committing the act of bankruptcy which he thus committed. But he testifies that, at the time he made the assignment, he knew he was not able to pay his creditors in full; that lawsuits were pending against him at that time, some being at issue; that he was advised by counsel, before he made the assignment, that he had a right to make an assignment of all his property, without preference, for the benefit of all his creditors; that he made it of his own accord, and not on the advice of his creditors, in good faith, for the benefit of his creditors, without intent to defraud any creditor, and not in contemplation of becoming a bankrupt; that he did the best he could with his property for his creditors; and that he had to make the assignment in order to save the property for the creditors generally. Now, by Section 39, it is provided that a debtor who, after the passage of the act, shall make any assignment of his property

with intent to delay, defraud, or hinder his creditors, shall be deemed to have committed an act of bankruptcy, that is, shall be deemed to have become bankrupt. The intent on the part of the bankrupt to delay and hinder his creditors by making the assignment, is proved in this case as a question of fact. The actual design in his mind to so delay and hinder his creditors, is testified to by himself. For he says that, knowing that he was not able to pay his creditors in full, and suits having been brought against him by some of his creditors, and being pending, he made the assignment of his own accord, after advice by counsel, in order to save the assigned property for his creditors generally. This can mean nothing else, than that he made the assignment in order to prevent the creditors who had sued him from appropriating towards the payment of their claims the assigned property. This would be to delay and hinder such creditors. The fact that the bankrupt made the assignment, as he states, without intent to defraud any creditor, is of no consequence, provided he had the intent to delay or hinder his creditors. The language of the 39th Section is, "with intent to delay, defraud, *or* hinder his creditors." The testimony of the bankrupt that he did not make the assignment "in contemplation of becoming a bankrupt," is entitled to no weight. What he means by that expression is not defined by him. If he means that he did not make the assignment "in contemplation of becoming bankrupt," in the sense of that expression, as used in the clause of the 29th Section, which is under consideration, and as hereinbefore interpreted, his own testimony, as already shown, proves that he did make the assignment in contemplation of becoming bankrupt. His general negation of the language of the statute, is outweighed by his testimony as to facts. If the words used by him, namely, "in contemplation of becoming *a* bankrupt," are intended to mean something different from the words "in contemplation of becoming bankrupt," and to imply that what he meant is, that when he made the assignment, he did not contemplate being actually adjudged to be a bankrupt, the answer is, that it was not necessary he should have contemplated the institution of proceedings in bankruptcy

against him, provided he contemplated, as he did, the commission of an act which is declared by Section 39 to be an act of bankruptcy, and for which he could, under that section, be adjudged a bankrupt, at the option of a creditor, subject to the conditions prescribed in that section.

As, therefore, the bankrupt made the assignment in question, with intent to delay and hinder his creditors, and thus committed an act of bankruptcy, he made it in contemplation of becoming bankrupt. The next question is, whether he made it for the purpose of preventing the assigned property from being distributed under the act in satisfaction of his debts. He avows that he knew he was not able to pay his creditors in full; that he made the assignment of his own accord, under the advice of counsel to the effect that he had a right to clothe an assignee with the power of distributing his property in satisfaction of his debts; that he thereby did the best he could with his property for his creditors; and that he had to make the assignment in order to save the property for the creditors generally. This shows an intent and a purpose on the part of the bankrupt to assume when he was insolvent, and when he contemplated committing an act of bankruptcy and becoming bankrupt, the distribution of his property in satisfaction of his debts through the agency of an assignee selected by himself. This necessarily involves the existence of a purpose to prevent the same property from being distributed under the Bankruptcy Act, in satisfaction of the same debts. There could be no other purpose. Such purpose is not disavowed by the bankrupt in his testimony. On the contrary, his testimony that he was advised by counsel before he made the assignment, that he had a right to make it, can only mean that he was advised that, as against the Bankruptcy Act and its provisions, he had a right to make such assignment, and to provide for the distribution of his property in satisfaction of his debts, by an assignee selected by himself, and subject to regulations prescribed by himself in the assignment, and thus prevent, if the assignment should be carried out, the distribution of the same property under the Bankruptcy Act. All this he did in contemplation

9 B.R. 10.

of becoming bankrupt, that is, of committing an act of bankruptcy because of which a creditor could, subject to the conditions prescribed in the 39th Section, put such property, but for such assignment, in the way of being distributed under the act, against the will of the bankrupt, in satisfaction of his debts.

The fact that the assignment in this case was one of all the bankrupt's property, and created no preferences among his creditors, makes no difference. It was as repugnant to the act as if it had assigned only a part of his property, or had created preferences. The language of the clause in the 39th Section is "*any* assignment" of his property, with the forbidden intent. It makes no difference what the terms or trusts of the assignment are, or how much or how little of the property of the assignor it conveys. So, the language of the 29th Section is "*any* * * * assignment of any part of his property" for the purpose defined. The whole includes all the parts and any one and every one of the parts, and the terms, conditions, and trusts of the assignment are of no consequence, provided the forbidden purpose exists.

It follows that the specification is sustained, and that a discharge must be refused.

Brown & Calvin, for the bankrupt.

Charles H. Smith, for the creditor.*

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

On the due return of warrant by marshal in a case of involuntary bankruptcy, counsel for bankrupts moved for further time to prepare proper schedules, the number of creditors and non-adjustment of accounts having prevented their completion. No one opposing, Register certified the facts and asked for new warrant to issue.

Held, The proper course was for the Register to adjourn the meeting of creditors to a day certain, on the ground of non-service of notice to creditors, and to have directed service of new notice, by mail or personally,

* See 1 N.B.R., 171; 2 N.B.R., 596; 1 N.B.R., 558; 2 N.B.R., 602.

but not in respect of publication. No adjournment having been made, the proceedings have fallen through and new warrant must issue.

In re JOHN F. SCHEPELER, JOHN D. SCHEPELER, AND LEON ROSENPLAENTER, *Involuntary Bankrupts.*

I, Edgar Ketchum, one of the Registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit, Mr. John W. Weed, who appeared for the bankrupt, and Mr. Edgar Logan, who appeared for the creditors of the said bankrupt, that is to say:

The warrant was issued by the District Judge, dated the 29th day of June, 1869, returnable the 20th day of July, at 12 o'clock, at noon, and was duly returned by the Marshal with proof of due publication of the notices required thereby, but without any proof of notice served by mail or personally, as therein required. On the return day, at the hour prescribed, the said attorneys appeared, and the attorney for the bankrupt made and filed an affidavit, showing that from the large number of creditors, and the necessary adjustment of numerous and difficult accounts between said bankrupts and creditors, home and foreign, they had been unable to prepare said schedules, and thereon he moved for further time, no one opposing the allowance thereof.

Wherefore I respectfully certify these facts to the judge, and ask that a new warrant may be issued by the court, to be returnable in the early part of October next.

EDGAR KETCHUM,
Register.

BLATCHFORD, J.—The proper course, in this case, was for the Register, under Sections 42 and 12, to adjourn the meeting of creditors to a day certain, on the ground that the notice to the creditors had not been given as required in the warrant, and to direct the giving for the adjourned day of a new notice in re-

spect of the serving by mail or personally, but not in respect of the publication. But, as there has been no adjournment, the proceedings have fallen through, and there must be a new warrant.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

S., a co-partner, agreed with another co-partner, who retired for a consideration, to dissolve partnership, except so far as necessary to continue same for liquidating its business, and to apply the proceeds of its property in payment of the partnership debts, and thereafter S., having made a special assignment for benefit of the firm and other creditors, he was adjudicated a bankrupt, individually, on petition of a creditor. Assignee in bankruptcy petitioned to have said assignment set aside, and the assignee under it to account for the proceeds, part of which he had paid to judgment creditors under decree of court.

Held, the assignee in bankruptcy of the individual partner has no title to call upon the other assignee, or any one else, to account for partnership property transferred by the retiring partner, and subsequently assigned, and his petition must be dismissed. In order to reach the partnership property through the Bankruptcy Court all the co-partners must first be adjudicated bankrupt.

In re THOMAS S. SHEPARD.

BLATCHFORD, J.—This is a hearing, on proofs taken, on a petition filed in this matter by Hiram Fisher, assignee of the bankrupt, against Andrew V. Stout. Prior to the 26th of February, 1867, the bankrupt and one William D. Cochran were in partnership, perhaps with two other persons, under the firm name of Shepard & Cochran, in the city of New York. On that day an instrument in writing was executed by and between Shepard and Cochran, of which the following is a copy:

"Memorandum of agreement between Thomas S. Shepard and William D. Cochran, made this 26th day of February, 1867. The partnership heretofore existing between the above-named parties in the business of buying and selling crockery and glass-ware is hereby dissolved by mutual consent, the dissolution to date from this date, except so far as it may be necessary to continue the same for the final liquidation and settlement of the business thereof. The said Cochran hereby

sells and transfers to said Shepard all his, the said Cochran's, interest in the assets, stock on hand, accounts and credits due the firm of Shepard & Cochran, and all other property of said firm. The said Shepard is to apply said property, and the proceeds thereof, to the payment of the partnership debts and the necessary expenses of carrying on the business.

"THOMAS S. SHEPARD,
"WILLIAM D. COCHRAN."

The consideration for this transfer by Cochran to Shepard was three thousand dollars, worth of crockery-ware which Cochran took at the time out of the stock-in-trade of the firm. On the 5th of March, 1867, Shepard executed and delivered a voluntary assignment to Stout, of all the merchandise and other personal property lately owned by the firm, and all of claims and demands due to the late firm, with the books of account and papers relating to the same, being all the property in respect of which Cochran had transferred his interest in the same as a partner in the firm to Shepard. The assignment was in trust to convert the property into money and collect the claims and demands, and after paying the expenses of executing and carrying into effect the assignment, to pay, with the residue, first, the debts specified in Schedule A to the assignment, and second, the debts specified in Schedule B to the assignment, and then all other liabilities for which Shepard was justly liable. The debts specified in the two schedules were all of them, in fact, debts due by the firm of Shepard & Cochran, and were stated to be such in those schedules. Stout accepted the trust, and entered into possession of the assigned property, and realized from sales and collections a little over twenty-one thousand dollars. On the 27th of March, 1867, the National Shoe and Leather Bank, of the City of New York, recovered a judgment in the Superior Court of the City of New York against Thomas S. Shepard and William D. Cochran, and the other two alleged partners, as joint debtors, for fifteen thousand two hundred and eighty dollars and eighty-eight cents. An execution issued on such judgment having been returned unsatisfied, the

plaintiffs therein brought a suit in equity in the said court against the four judgment debtors, and Stout, setting forth the recovery of the judgment and the return of the execution, averring that the debt to the plaintiffs was contracted by the four judgment debtors as co-partners composing the firm of Shepard & Cochran, setting out the transfer by Cochran to Shepard, and the assignment by Shepard to Stout, claiming that the assignment was, for various reasons stated, fraudulent and void, and praying that it might be set aside and declared fraudulent and void as against the plaintiffs, and that it might be adjudged that the plaintiffs were entitled to payment of their judgment out of the assets and the proceeds thereof in the hands of Stout, and that Stout pay over the same accordingly.

Process in the suit in which the judgment was recovered was served on Shepard, and on him only, and process in the equity suit was served on Shepard and on Stout, and on them only, although in the latter suit an appearance by attorney was put in for all of the defendants. No answer or defense was put in in either of the suits.

On the 13th of June, 1867, a judgment was rendered in the equity suit, setting aside the assignment from Shepard to Stout, declaring it to be fraudulent and void, as against the plaintiffs, and adjudging that the plaintiffs were entitled to payment of their judgment for fifteen thousand two hundred and eighty dollars and eighty-eight cents, out of the assets assigned to and in the hands of Stout, and directing Stout, as such assignee, to pay the amount of the judgment out of the said assets or the proceeds thereof in his hands. Stout, on the 14th of June, 1867, as such assignee, paid to the plaintiffs the amount so decreed to be paid. He also, before the 13th of June, 1867, paid out of the assets assigned to him all the claims specified in Schedule A to the assignment, the debt to the Shoe and Leather Bank having been itself one of the debts specified in that schedule. There still remained in his hands the sum of about seventeen hundred dollars, which he claimed to be entitled to retain and apply to the purposes of the assignment.

In re Shepard.

On the 3d of July, 1867, the Mechanics' Bank of Brooklyn, as a creditor of Shepard, filed a petition in this court, praying that Shepard might be declared a bankrupt for certain acts of bankruptcy alleged in the petition, and, among them, the making of the assignment to Stout. In that proceeding Shepard was adjudged a bankrupt, and Fisher was appointed his assignee, and the usual assignment of the property of the bankrupt was made to Fisher.

The petition of Fisher, now under consideration, is brought to have the assignment from Shepard to Stout declared null and void under the provisions of Sections 35 and 39 of the Bankruptcy Act, and the property which came into his possession under said assignment, or the full value thereof, delivered up to Fisher, as assignee, on the ground that the assignment was made by Shepard with intent to give preferences, when he was insolvent, and so known to be by Stout. The petition is not at all founded on the preference obtained by the National Shoe and Leather Bank by the equity suit in the State court, or on the payment made by Stout to the bank under the decree in that suit. The petition does not set up such suit or decree, but the answer of Stout to the petition sets them up in defense.

There is a difficulty in this case which lies at the threshold of Fisher's right to recover. The agreement of the 26th of February, 1867, whatever effect it may have had to dissolve the partnership between Shepard & Cochran, as to future business and debts to be contracted thereafter, had no such effect as respected the partnership property in which Cochran theretofore had an interest, or as respected the partnership debts named in that agreement, or as respected proceedings under the Bankruptcy Act, to affect such partnership property. The agreement expressly declares that there is to be no dissolution of the partnership, so far as it may be necessary to continue the same for the final liquidation and settlement of the business thereof, and the transfer to Shepard of Cochran's interest in the property of the firm is expressly made subject, by the agreement, to the trust that Shepard is

to apply the property, and the proceeds thereof, to the payment of the partnership debts. The case is not one where the transfer of the interest of the retiring partner in the partnership property is absolute, and the remaining partner merely agrees to pay, and assumes the debts of the partnership, as was done in *Robb* v. *Mudge* (14 Gray, 534). In the present case Cochran took from Shepard an express agreement that the partnership property assigned, and its proceeds, should be applied by Shepard to pay the partnership debts, and the agreement made by Shepard was to pay those debts with that property. Therefore, as respected Cochran and the creditors of the firm there was no dissolution of the partnership, and no such transfer to Shepard as would make the property his individual property until and unless the partnership debts were first paid. This being so, there must be an adjudication of bankruptcy against the partners composing the firm, and an assignee must be appointed in such a proceeding before any step can be taken to reach in bankruptcy the partnership assets. Shepard alone has been adjudged a bankrupt. As there are partnership assets, the partnership continues as respects proceedings in bankruptcy. Under the provisions of Section 36 of the act, the co-partnership property cannot be taken and administered by the Bankruptcy Court unless all the persons who have an interest as co-partners in such property are adjudged bankrupt. In order to reach such property, it is necessary, under Section 36, that Fisher shall have been appointed assignee in a proceeding against all of such co-partners. He is only the assignee of the individual and separate estate of Shepard, in a proceeding in bankruptcy, against Shepard alone. He shows, therefore, no title to call Stout or any one else to account in respect of the property which purported to have been assigned by Cochran to Shepard, and by Shepard to Stout.

These views dispose of the case, without reference to any of the other questions raised or discussed. It is not necessary to decide whether any other persons than Shepard and Cochran were members of the firm, as, on the status of the partnership

property, as left by the agreement between Shepard and Cochran, it is immaterial whether or not there were other partners in the firm.

The petition must be dismissed with costs.

H. Loring Cushing, for Fisher.

E. L. Fancher, for Stout.

UNITED STATES DISTRICT COURT—DISTRICT OF NORTH CAROLINA.

An assignment executed to the assignee by the Register, there being no opposing interest, does not require to be proved before a Clerk of the Superior Court, or his certificate to prepare it for registration.

Registers of deeds must record the same upon a certificate of the Clerk of the District Court, that the same is a copy of the assignment on file in his office, with his seal affixed, upon demand that the same shall be recorded, and a tender to him of the fees allowed for such service by the laws of the State.

In re CHARLES E. NEALE

CERTIFICATE OF REGISTER.

I, R. F. LEHMAN, one of the Registers of said Court in Bankruptcy, do hereby certify, that in the course of the proceedings in said matter before me, the following question arose pertinent to said proceedings, viz.: I had been notified by W. M. Pippin, the assignee of Charles E. Neale, bankrupt, that the Probate Judge of the county of Edgecombe refuses to admit to probate the assignment executed by me under the 14th Section of the United States Bankrupt Act to him as assignee, upon the ground that the Register must appear before a Judge of Probate, and acknowledge his signature. This the Register declines to do, for the reason that in his opinion this proceeding is unnecessary, and the State officer is bound to admit the deed to probate without it.

Section 14, General Clause 46, provides that the Register shall (where there is no opposing interest), by an instrument under his hand, convey to the assignee all the estate, real and personal, of the bankrupt.

General Clause 61 provides that the assignee shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States, where a conveyance of lands owned by the bankrupt ought by law to be recorded. The assignment of bankrupt's effects is an official act, conveying property held by a judicial officer of the United States in trust to an assignee under authority of an act of Congress. The mode of assignment is such as to make it a record of the court. It is not the record of a State court, requiring to be exemplified under the Act of Congress of May 26th, 1790, but of a United States court, which authenticates itself. In the case of *Pepoon* v. *Jenkins*, 2 Johns. Cas., 119, a record of a court of the United States was offered in the Supreme Court of New York, and upon issue joined upon a plea of *nul tiel* record was held sufficient, though it was merely certified by the clerk as a copy under the seal of the court. In this case the deed is under the hand of the Register and seal of the court. Independently of the common law on the subject, under G. O. 54, even a certified copy under the seal of the court is conclusive—a portion of the original. The assignment then is a record of the United States District Court, is conclusive evidence in the form in which it now stands of the transfer of the bankrupt's assets in all courts, and should be ordered to be registered by the Probate Judge.

The provisions of the Code of Civil Procedure in relation to the probate of deeds, is clearly not intended to refer to official deeds of the officers of courts. Now, if it were so intended, is it conceived that the State could affect the operation of the Bankrupt Act. The registration of the assignment is clearly necessary to the proper working of the act. If the State could prescribe the nature of proof of its execution, it might make it so difficult as to practically be impossible. This is evident when it is considered that prior to the late amendments to the code it would have been, if the view which is taken by the Probate Judge is correct, necessary for the Register in each case of an assignment which conveyed property in any county in the State, to go personally to that county and acknowledge

the deed. I therefore cannot, as Register, perform the superfluous act of acknowledging the deed. If the Probate Judge declines to admit the assignment to probate, his decision can be reviewed by a Judge of the Superior Court. It is therefore deemed unnecessary to intimate an opinion as to any remedy which may be had in the premises through the United States authorities, but the delay consequent upon a proceeding before the State courts might prevent the due registration of this deed within the six months. It is therefore conceived that an order might issue directly from the District Judge to the Probate Judge of said county, commanding him to do what the law requires.

R. F. Lehman, *Register.*

To Hon. G. W. Brooks.

Brooks, J.—The question presented by the certificate of Mr. Register Lehman in this case is, whether the deed of assignment executed to the assignee by the Register (there being no opposing interest), and the same duly certified by the clerk under the seal of the court, should be proved before a clerk of the Superior Court, and be by him certified and ordered to be registered according to the provision of the laws of North Carolina, in relation to deeds executed by private parties, before the same can be registered.

I have examined carefully the reasons assigned by the Register for the opinion expressed by him, and fully concur in both his reasoning and conclusion. I have no doubt but that the Congress of the United States has full power, in framing "A uniform system of Bankruptcy," to adopt such provisions as it may think proper in regard to the probate of any deed or assignment that may become necessary in carrying out the purposes of the law.

Much importance should be attached to that expression "Uniform system throughout the United States." All of the States, I believe, have their bankrupt or insolvent laws; but these are not respected beyond the limits of the State passing such law, and the reason why they are not respected beyond

the limits of the State passing them, is that there is no uniformity in the system of the State Bankrupt Laws; many of them resembling each other in many respects, but no two alike in every respect, hence no two with the same system. It could not properly be contended that Congress, under the power expressly delegated by the Constitution, could pass one system of bankruptcy laws to be in force in one State, and altogether another and a different system to be in force in another State. Indeed, if there were any essential differences, it would not conform to that important requirement. It would not be "A uniform system." The contrary might possibly be contended for if the power to pass a Bankrupt Law by Congress was claimed as a constructive or implied right. But when the power is expressly given, it excludes any implied power, and when a particular system is prescribed it effectually excludes any other system than the one provided. Then the only system of bankruptcy laws which Congress has the power to pass, is a uniform one. One which requires the same acts and same duties from the officers appointed to execute the law in all the States, and producing the same general results in all the States, without regard to the important differences existing in the laws of the different States.

If, in preparing and passing the present system of bankruptcy laws, Congress had omitted to make any provision in regard to executing and registering the conveyances or assignments required, I would readily hold that the State laws should be conformed to. If I am not altogether wrong in the views I have expressed, then the only question remaining to be considered is whether the Bankruptcy Act prescribes the forms to be observed in executing and preparing this instrument (the assignment) "to be recorded in every county or registry in the United States in which lands of the bankrupt are situate." I think the act already so provides. The object in requiring the assignment to be recorded is not to vest a title in the assignee, for he has title though the assignment might never be recorded. The assignee may use it as evidence of his title in the courts, though the same may not have been registered. In this an

assignment under the provisions of the Bankruptcy Act is essentially different from a deed or assignment (though absolute) made under the provisions of the laws of North Carolina.

Under the latter, registration is necessary to the perfecting the title, though the deed be absolute. But the purpose in requiring the assignee to "cause the assignment to be recorded in every county or registry in the United States in which lands of the bankrupt are situate," is that every purchaser of land at an assignee's sale may have recourse to a certified copy from such registry as a link in his claim of title in any suit he may bring for the possession, or in any suit in respect to the property which he, or his heirs, or others claiming under him, may desire to bring thereafter. Registration is necessary for the safety of such purchaser; for there is but one original assignment, which is filed in the District Court clerk's office. It might be destroyed or lost, and often most inconvenient to have recourse to. Where this law is observed the loss of the original would work no damage, or work inconvenience to the purchaser or any others claiming under him, for they have recourse to a "certified copy" from the registry convenient, and which the act declares "shall be evidence thereof in all courts." It seems to me that any other conclusion would not be sustained by the language or the clear meaning of the act. In the first paragraph of the 14th Section, after providing that the assignment shall be made by the Judge or Register, we find the following: "And thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in the assignee." There is nothing preceding this language in regard to registration.

Then, what do we find subsequently in the same section to sustain the view that registration is not necessary to perfect the title of the assignee, and also that there is no other probate contemplated as necessary than the attestation of the clerk and affixing his seal of office; (that this means the clerk of the District Court of the United States there can scarcely be room for doubt.) After declaring that the assignee may sue for and recover the estate, prosecute and defend all suits in which the

bankrupt may be a party, we find the following: "And a copy duly certified *by the clerk* of the court, under the seal thereof, of the assignment made by the judge or register (as the case may be) to him as assignee, *shall* be conclusive evidence of his title as such assignee to take, hold, sue for, and recover the property of the bankrupt." And to show further that no other proof or probate of the assignment than appears to have been made in this case is necessary, I refer to the language of that paragraph of the 14th Section which relates directly to registering the assignment. It is as follows: "And shall within six months cause the assignment to him to be recorded in every registry of deeds, etc." If the law had contemplated proof as required by the State laws, is it not most likely the words *proved* and *recorded* would have been used?

My opinion is that such assignment does not require to be proved before a Clerk of the Superior Court, or his certificate to prepare it for registration. But that Registers of Deeds must record the same upon a certificate of the Clerk of the District Court that the same is a copy of the assignment on file in his office, with his seal affixed, upon demand that same shall be recorded, and a tender to him of the fees allowed him for such service by the laws of the State. Let this be certified to Mr. Register Lehman.

UNITED STATES DISTRICT COURT—NORTH CAROLINA.

The plaintiff in judgment obtained in the Federal Court on which execution issued and under which the Marshal sold, is entitled to the proceeds of such sale, although that judgment, execution, and levy under it was subsequent to the judgment, execution, and levy of the process from the State court.

In re Wm. G. Jordan.

Brooks, J.—Joshua Barnes filed his petition in this cause, in which he states that at Fall Term, 1867, of the Superior court for Wilson county, he recovered a judgment against one Wilie Lamm, for the sum of three thousand dollars, principal money, with interest on the same, from the 2d day of Decem-

ber, 1867, until paid, and for fifteen dollars costs; that execution was issued thereon from said term, returnable to the Spring Term of 1868. That the same came to the hands of J. W. Davis, sheriff, and was by him levied and returned to Spring Term, 1868, indorsed as follows: "Levied on the lands of Wilie Lamm, in the Contention District, adjoining the lands of Thomas Lamm, and others, containing seven hundred and six acres, more or less. J. W. Davis, Sheriff."

That after the said levy had beep made, Wm. M. Gay, as assignee in bankruptcy of Wm. G. Jordan, obtained a judgment against said Wilie Lamm, in the District Court of the United States, upon which execution issued and came to the hands of the marshal, and was by him levied upon the lands previously levied upon by the sheriff, Davis.

That the execution so levied by the marshal was returned to the District Court, and thereupon a *vend. exponas* issued, under which the marshal sold the lands and executed a deed to the purchaser. That after deducting the costs and expenses of the sale, the marshal paid over the net proceeds of the sale to said Gay, the plaintiff in the process under which he acted, who now holds the same as assignee. The petitioner further states that he was prevented from issuing a *venditioni exponas* and executing the same, by the stay law then in existence in North Carolina.

The petitioner prays this court, as a Court of Bankruptcy, to declare upon these facts (which are admitted by Gay, the assignee to be true), that Barnes, the plaintiff in the judgment in the State court, is entitled to the net proceeds of the sales realized by the marshal, and by him paid over to the assignee; and asks the court to make such order as will oblige the assignee, to pay over the same to Barnes, the sum so realized being less than his judgment.

I have not been aided by argument in this case, yet I am fortunate in having had this question presented and fully argued at the last term of the Circuit Court for this district, by gentlemen of great learning and ability on both sides.

In that case the court decided that the plaintiff, in the judgment obtained in the Federal Court on which the execution

issued and under which the marshal sold, was entitled to the proceeds of such sales, although that judgment, execution, and levy under it was subsequent to the judgment, execution, and levy of the process from the State court. I must refuse the order prayed for in this case for the same reasons that influenced the decision in that case. The marshal, like a sheriff, can only sell and convey such right or interest in property as the process in his hands will warrant; though he may declare that he sells more or a higher interest, or even so states in his conveyance, yet his conveyance transfers no more or greater interest to the purchaser than the law, by virtue of the process and the proceedings upon which the same is based, allows to pass.

It follows, then, that if a prior lawful incumbrance or lien exists, the sale is made subject to such incumbrance, and can only be made subject to such incumbrance.

A purchaser at execution sale is as much bound to know of the existence of a prior lien or incumbrance existing against the property offered by force of a judgment, execution, and levy as if it was an incumbrance existing by mortgage or in any other way.

If the plaintiff Barnes has lost his lien, it is not from any unauthorized act of the marshal, but from his observance of the stay law passed by the Legislature of North Carolina, so recently declared unconstitutional by the Supreme Court of the State, and which, if unconstitutional, was never of any force.

Let this be certified to Mr. Register Lehman.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

Held, 1. That the words "fourteen days" as used in the 39th Section of the Bankrupt Act, do not necessarily apply to the case of a *fraudulent* stoppage of the payment of commercial paper.

2. When a man declines to pay, solely because he is not liable to pay, or because he has a valid claim or offset against the paper, this is not a stoppage or suspension within the meaning of the Bankrupt Law.

3. When the paper is due and it is not paid, because without adequate legal

excuse the maker will not or is not able to pay, and it is continued for the period of fourteen days, *Held*, that this constitutes an act of bankruptcy.

In re THOMPSON & MCCLALLEN, *Involuntary Bankrupts.*

DRUMMOND, J.—This is a very important question undoubtedly, but it is one that has been before me on several occasions, and although there never has been an express adjudication on the point, still, incidentally, I have expressed an opinion as to the true construction of this clause of the Bankrupt Law; and inasmuch as I have a decided opinion upon it, I might as well state that opinion now, with some of the reasons upon which it is formed.

The petition alleges that Thompson & McClallen did commit an act of bankruptcy, within six calender months next preceding the date of the filing of the petition, in that they, being merchants, on the 2d day of January, 1869, suspended, and have not resumed payment of their commercial paper within the period of fourteen days, setting forth what the commercial paper is.

An objection is taken on the part of Thompson & McClallen that this is not an act of bankruptcy within the meaning of the law.

The clause of the 39th Section of the Bankrupt Law under which the question arises is this: "or who, being a banker, merchant, or trader, has fraudulently stopped or suspended, and not resumed payment of his commercial paper within the period of fourteen days."

That constitutes an act of bankruptcy on the part of any person who is within the conditions named, and the only question, as I conceive, is whether the word "fraudulently" applies to and qualifies the whole of the clause—whether it is to be read as if written: "who, being a banker, merchant, or trader, has fraudulently stopped or fraudulently suspended, and not resumed payment of his commercial paper within the period of fourteen days," or whether it is to be read as if written in this way: "or who, being a banker, merchant, or trader, has fraudulently stopped" payment of his commercial paper; or who, being a banker, merchant, or trader, has "suspended and not resumed

payment of his commercial paper within a period of fourteen days," applying the words "fourteen days," to the *suspension* only, and without the use of the word fraudulently; and I think the latter is the true construction. It would seem to be unreasonable to say that in order to constitute an act of bankruptcy, a merchant, or trader, or banker, must stop during fourteen days by *a continuous act of fraud.* It would seem as though *one* act of fraud, by stopping payment of his commercial paper, committed by a banker, merchant, or trader, should constitute an act of bankruptcy. There is no reason why there should be a continued fraud for the period of fourteen days in order to constitute an act of bankruptcy; because, where a merchant, banker, or trader—and who is therefore within the terms of the law—deliberately commits an act of fraud by refusing to pay, or by stopping payment of his commercial paper, he is in that condition where his creditors ought to have the right to call upon him to surrender his property for their benefit. He has acted dishonestly, and he should have his property administered in a Bankrupt Court.

And, on the other hand, where he merely suspends the payment of his commercial paper, it was highly proper that some time should be fixed, within which, if he does not resume, it should be treated as an act of bankruptcy; because it was foreseen that he might suspend payment of his commercial paper through accident, a particular emergency or exigency, which might be temporary in its character, as in consequence of the non-receipt of remittances, or of the non-arrival of a vessel, or from other similar causes, and therefore the law intended that if there was a suspension in consequence of any of these causes, it should not be treated as an act of bankruptcy unless it continued for a certain time; and inasmuch as it was the province of the lawmaker to declare what that time should be, he, in his discretion, has fixed the time at fourteen days.

But if a man declines to pay solely because he is not liable to pay, or because he has a valid claim against the paper, or a set-off, that is not a stoppage or suspension, as I understand it, within the meaning of the Bankrupt Law.

But where the paper is due and it is not paid, because without adequate legal excuse he will not pay, or because he is unable to pay, and it is continued for the period of fourteen days, that constitutes an act of bankruptcy.

I am aware that different constructions have been given to this clause by different courts, but it seems to me that this is the only construction which is consistent with the general scope and spirit of the Bankrupt Law. The law ought to make no compromises with a fraudulent act, but if the construction contended for on the part of the defense is the true construction, then it does make terms with an act of fraud, and declares the fraud may be continued day after day, but, if less than fourteen, no act of bankruptcy has been committed.

I do not think that could have been the intention of the lawmaker in the use of this language. It may be conceded that it is not so clear and distinct as it might have been; but we have to construe it with a view of carrying into effect the spirit of the law, and the construction which I have placed upon it I think best accomplishes that result.

Bentley & Hart, solicitors for petitioning creditors.

C. C. Bonney, attorney for bankrupts.

UNITED STATES CIRCUIT COURT—DISTRICT OF INDIANA.

A note executed in Cincinnati, Ohio, for the unconditional payment of a certain sum of money, and payable to the order of the payee, is "commercial paper" within the meaning of the 39th Section of the Bankrupt Act.

On mere proof that a trader, within six months before a petition in bankruptcy was filed against him, failed to pay his commercial paper for fourteen days, and did not resume payment thereof till such petition was filed, the *prima facie* presumption is that such failure was fraudulent; and such proof casts on him the burden of rebutting that presumption of fraud by satisfactory evidence.

J. H. HEINSHEIMER *et al. v.* PATRICK SHEA & WILLIAM BOYLE.

McDONALD, D. J.—On the 7th of June, 1869, J. H. Hein-

sheimer and others filed a petition in bankruptcy against Patrick Shea & William Boyle.

The petition charges that Shea and Boyle, partners, traders, etc., have committed an act of bankruptcy, in this, "that within six months next preceding the date of this petition, the said Patrick Shea & William Boyle did commit an act of bankruptcy within the meaning of said act, in that they did, on the 28th of January, 1869, fraudulently suspend and stop the payment of their commercial paper, and did not resume the payment thereof within fourteen days thereafter, and have never paid the same. This commercial paper the petition alleges to be a note, dated at Cincinnati, January 27, 1869, for nine hundred and twenty-six dollars and fifty-five cents, payable one day after date, to the order of the petitioners, and executed to them by Shea & Boyle. The defendants have filed an answer denying the allegations in the petition, and the issue thereon made is submitted to the court for trial.

On the trial it is agreed and admitted that if the note in question is "commercial paper" within the meaning of the Bankrupt Act, and if the mere fact that the defendants have failed to pay the same up to the time of the filing of the petition, is *prima facie* evidence of a fraudulent suspension of payment, within the meaning of the 39th Section of the act, then the court shall find for the petitioners.

This agreement confines our inquiries to two questions: First, is the note mentioned in the petition "commercial paper?" Second, when traders stop the payment of their commercial paper for fourteen days, and do not afterwards resume it, is this, *prima facie*, a fraudulent suspension of payment? We will examine these questions.

First. Is the note in question commercial paper? It is payable on its face to the order of the payees. It is dated at Cincinnati; and, in the absence of any evidence to the contrary, I must, therefore, presume that it was executed in the State of Ohio. We need not cite authorities to show that, in such a case, the *lex loci contractus* governs the contract. Then, the note being executed in Ohio, is to be construed by the law of

Ohio. The law of Ohio puts notes like this on the same footing as inland bills of exchange. The note is, therefore, commercial paper, within the meaning of the Bankrupt Act.

Second. When traders stop payment of their commercial paper for fourteen days, and do not afterwards resume it, is this *prima facie* evidence of a fraudulent suspension of payment?

The language of the Bankrupt Act is, that every person "who, being a banker, merchant, or trader, has fraudulently stopped or suspended, and not resumed payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy."

This question has been much discussed in many of the District Courts of the United States; learned judges have given various and different answers to it; and it still remains unsettled. Three views appear to have been taken of it: first, that the mere failure to pay, or to resume payment, is conclusive evidence of fraud; second, that it is only *prima facie* evidence of fraud; third, that it is no evidence at all of fraud. Without entering upon a discussion of the reasons upon which different judges have come to these opposite conclusions, I conclude that the failure to pay, and to resume payment, is *prima facie* evidence of fraud, and no more. I thus decide for the following reasons:

First. To hold that such failure to pay and to resume payment is conclusive evidence of fraud, and, consequently, of an act of bankruptcy, would sometimes be followed by unjust and absurd consequences. If we adopt this rule, then we might force into bankruptcy the wealthiest and most prosperous trader in the country. Suppose a trader to be worth one hundred thousand dollars and to owe one thousand dollars on commercial paper. At the time when this paper falls due, some accident befalls him; he is prostrated by sickness; all the money he has on hand is stolen or depreciates greatly in value. Or, suppose that he is necessarily abroad, and cannot reach home within the fourteen days, and, by mere forgetfulness, did not, before leaving home, provide for paying such commercial paper—in these, and many other cases that might be supposed, the credit-

ors would be entitled to file their petition against him in bankruptcy on the next day after the expiration of the fourteen days. But, in such cases, it would be harsh and absurd to hold that his mere failure to pay before the petition was filed, is conclusive of a fraudulent intent on his part, and to preclude him from offering evidence exculpating him from such intent, and evincing his ability and willingness to pay.

Second. It is a point of pride, as well as of duty, that traders shall not suffer their commercial paper to be dishonored. Every one knows that such dishonor seriously affects his commercial reputation and business. It is reasonable, therefore, to presume, when he fails promptly to honor his commercial paper, either that he does so fraudulently, or is insolvent. For if he can pay and does not, that is, among traders, a fraud within the meaning of the Bankrupt Law; and, if he is insolvent and cannot pay, but still carries on his trade, this I think is, in view of that law, a fraud; at least he can, in that case, have no reason to complain if his creditors attempt to have him adjudged a bankrupt. I think, therefore, that a banker, merchant, or trader, who stops payment of his commercial paper for fourteen days, and does not afterwards resume it before he is proceeded against as a bankrupt, is not to be deemed, *prima facie*, innocent of all fraud.

Third. Such a failure to pay, on the part of a banker, merchant, or trader, ought to be so far deemed evidence of fraud as to cast on him the necessity of explaining his conduct, because of the great difficulty, in such a case, of proving actual fraud. It is generally true, indeed, that when the question is fraud or no fraud, he who alleges fraud must prove it. But, in cases like the present, it is almost impossible, by direct evidence, to prove actual fraud. However great the fraud might be, all that we could reasonably expect the petitioner to be able to prove, would be the failure of the debtor to pay the commercial paper. The intent which led to the failure, it would generally be impossible to prove by anything like direct evidence. But, on proof of the failure, I think the fraudulent intent may be fairly inferred till the contrary is proved. On the other hand, if

facts exist which may fairly rebut the inference of fraud, they would, in most cases, be easily proved. For example, the facts we may suppose to be, as above stated, severe and protracted sickness, or unavoidable and unexpected absence from home, and the like. In such cases the debtor could generally prove the facts, and thus rebut the *prima facie* case made by the proof of mere omission to pay. This rule, making the mere failure to pay *prima facie* evidence only of a fraud, therefore commends itself to us on account of its fairness, its plainness, and its easy and general application to cases of this kind. Moreover, it appears to me to be quite consistent with the general scope of the Bankrupt Act, and to do no violence to the 39th Section, on which this question arises. Avoiding extremes, therefore, and following the maxim *in medio tutissimus ibis*, I conclude that the failure on the part of a banker, merchant, or trader, to pay his commercial paper for fourteen days after it falls due, unless payment is resumed before proceedings in bankruptcy are commenced against him, is *prima facie* evidence, and only *prima facie* evidence, that he has committed an act of bankruptcy.

Reid & Carey, for petitioners.

Hendricks, Hord & Hendricks, for defendants.*

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Chattel mortgagee petitioned to have his mortgage declared a valid and subsisting lien on property of bankrupts, and that the assignee be ordered to surrender to him the mortgaged property. Assignee objected to the jurisdiction of the Bankruptcy Court until the mortgagee should prove his debt against the estate.

Held, 1. The court has concurrent jurisdiction with other tribunals to hear and determine the question of lien in the premises.

2. The mortgagee cannot prove his debt in bankruptcy unless he releases or surrenders the mortgaged property, or agrees with the assignee as to its value, so that he might prove for any excess of indebtedness over such value.

3. Before the choice of assignee, if such a mortgagee seeks to prove his debt, he must abandon his security; but, after appointment of assignee, he

* See amendment, July 14, 1870, Section 2.

may prove for any balance of his debt, after deducting the value of the mortgaged property, as agreed upon with the assignee.

In re WILLIAM C. HIGH AND WILLIAM B. HUBBARD.

WITHEY, J.—Joseph Hubbard has filed his petition, asking that a chattel mortgage given by the bankrupts to petitioner to secure payment of the bankrupts' indebtedness to him, may be declared to be a valid and subsisting lien upon the property of bankrupts, and that the assignee in bankruptcy may be decreed to deliver the mortgaged property to petitioner, mortgagee. The assignee has answered the petition, proofs have been taken, and the cause is ready for hearing upon the petitions and proofs. But now comes the assignee and interposes an objection to the jurisdiction of the court in bankruptcy to hear the petition—because the petitioner has not proved his debt against the bankrupts' estate.

The exact question is whether the mortgagee can obtain a standing before the court in the course of the litigation in the bankruptcy proceedings without first having proved his debt.

Regarding the mortgage as *bona fide*, and a valid, subsisting lien upon the goods of the bankrupts, the goods being in possession of the assignee, if the mortgagee may not file his petition or bill to have the question of priorities and rights declared, then his remedy would be by action against the marshal, for taking the goods from his possession, or against the assignee for not surrendering on demand—in the appropriate form of remedy.

But it is claimed by the assignee that a secured creditor may prove his debts, and then he will be in a position to apply to the court by petition, and have his rights declared.

Cases are cited to show that a secured creditor may prove his debt without surrendering the mortgaged property, and without a sale by the assignee of such property. It is contended that such has been and is the construction of Sections 19, 20 and 22 of the Bankrupt Act, notwithstanding the prohibitory provisions. I think there is no real conflict between these sections, but I take an entirely different view of them from that claimed by counsel for the assignee. Section 19 enacts that "all debts

due and payable from the bankrupt, may be proved against the estate of the bankrupt," and Clause 2, Section 20, declares that "if the property is not sold, or released and delivered up (to the assignee), the creditor shall not be allowed to prove any part of his debt." Now, before referring to Section 22, I propose to show that there is no conflict between Sections 19 and 20. They will harmonize by giving to Clause 2, Section 20, the exact effect it would have if it had been added to Clause 1, Section 19, as a proviso.

Then the substance of Clause 1, Section 19, and Clause 2, Section 20, would read as follows: "All debts due and payable by the bankrupt, may be proved and allowed against the estate of the bankrupt;" *provided*, "when the creditor has a mortgage or pledge of real or personal estate of the bankrupt * * for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such a manner as the court shall decide; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole claim. If the property is not sold, or released and delivered up, the creditor shall not be allowed to prove any part of his debt."

This last clause must not be regarded as preventing the secured creditor from proving the balance of his debt after deducting the value of the mortgaged property, whenever that value has been agreed upon between the creditor and assignee. This reading of Clause 1, Section 19, and Clause 2, Section 20, in connection, gives harmony to the two provisions. Now, what view is to be taken of Section 22, the language of which would seem to contemplate proof by a secured creditor of his debt, with a view of participating in the choice of assignee. Clause 2, Section 22, is this: "To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, on oath, * * * setting forth * * * *whether any and what securities are held*

therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person for his use, received any *security* or satisfaction whatever, other than that by him set forth." And he is also to state what certain things have not been done, "Whereby the vote of such creditor for assignee, or any action on the part of such creditor, or any other person, in the proceedings under this act, is, or shall be, in any way affected, influenced, or controlled."

It is obvious in my mind, that what is said in Section 22, relating to a secured debt, is to be understood in view of the provisions of Sections 19 and 20, to give the right to prove secured debts only when the secured creditor is in that position where by Section 20 he may make such proof, not while he stands in an attitude of opposition to other creditors or to the estate of the bankrupt. If such creditor seeks to prove his debt before the choice of assignee, he must abandon his security. Whereas, if he seeks to prove his debt after the choice of assignee, he is to be permitted to do so when he has complied with the terms of Section 20. As he has security, the policy of the act is to leave his rights to be settled after there is an assignee to contest his claims to the property and protect the estate.

To hold otherwise would be to annul the positive language of Section 20, declaring that, "If the property is not sold, or released, and delivered up, the creditor shall not be allowed to prove any part of his debt." Thus, to hold is not demanded by the various provisions of the act, and would be allowing the positive language of a statute to be repealed by a subsequent clause of the same act, and that by mere implication. The apparent want of harmony between those provisions is not of a character to require the courts to say there is any conflict, because in the views suggested they can be made to harmonize. Thus we see when the secured creditor may prove his debt in part, when the entire debt, and when he is prohibited from proving any part of his debt.

Now, the secured creditor who presents his petition to have

his rights declared, in this case, occupies an attitude of opposition to the general creditors, and to the assignee, refusing as he does to release or surrender the mortgaged property, and no agreement having been arrived at between him and the assignee as to the value of the mortgaged property, so that if there be an excess of indebtedness over the value of property, he might prove for such excess. Standing thus he cannot prove his debt against the estate.

Section 14 declares that a valid mortgage of property shall not be affected by the transfer of the bankrupt's estate to the assignee. What, then, is the interest of the assignee in the mortgaged property? A right of redemption, precisely what the right of the bankrupt was before the bankruptcy.

It will not be questioned, but an assignee in bankruptcy may by petition bring before the court any question involving rights between him as assignee, and other persons setting up an interest in the property of the defendants. This is a common practice, is summary, and on many accounts more desirable than the institution of a suit, which must be tried and determined according to the course and rules of the common law.

I think Section 1 gives the court in bankruptcy jurisdiction to hear and determine all questions of liens and priorities involving rights to the bankrupt's estate, and *that* jurisdiction may be invoked by a creditor claiming under a lien or mortgage as well as by the assignee. This jurisdiction is not exclusive, but concurrent with that of other tribunals. And generally when the proceeding is by a preferred creditor, notice on the assignee who represents the estate will be sufficient, without notice to the creditors, though exceptions might be allowed to this rule in some cases very properly.

Supposing the petitioner to have a valid claim for the goods in question, he should be protected in his right. If the value is less than the debt secured, his possession and control should not be interfered with.

But if the property exceeds in value the debt, the court may, on a proper showing, interfere to protect the surplus, so as to

insure its coming to the general creditors—always seeing that the secured creditor is protected to the extent of his secured debt.

I hold, that the objection made by the assignee is not well taken. The case will accordingly be for hearing on petition and proofs.*

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A discharge will not be withheld when it appears solely from the bankrupt's examination that he had paid certain debts in full, a short time before he became bankrupt, no other proof being offered to show such payments were fraudulent preferences.

The accidental omission of entries in a trader's book is not conclusive of his not having kept proper books of account.

Semble, Where a creditor has been preferred by bankrupt, it may not be necessary to show such creditor's fraudulent collusion in order to prevent a discharge.

In re Joseph H. Burgess.

Lowell, J.—The bankrupt's discharge is opposed on the ground that he did not keep proper books of account, and that he preferred certain of his creditors. The evidence is derived wholly from the bankrupt's examination, which appears to be full and frank. There is no question of law in the case excepting what preferences will avoid the discharge. My opinion upon that point was expressed in *Locke's* case, 2 N. B. R., 123 *quarto*, 382 *octavo*. My remarks in that case need no qualification, except that perhaps if the debtor's conduct brings him within Section 35, it may not be necessary to show the collusion or fraud of the preferred creditor in order to prevent the discharge. The distinction is not very important, because all the acts prohibited by Section 35 are acts done in contemplation of bankruptcy, and all such are also within Section 29, or nearly all.

In this case the evidence shows that the debtor paid several

* See *in re* Grinnell & Co., 9 N. B. R., 29, holding a secured creditor must prove his debt in bankruptcy before he can apply the security he holds to the payment of his claim.

creditors in full not very long before he became bankrupt, but his own explanation, which is all we have, does not tend to convict him of contemplating bankruptcy at that time, and the transactions themselves were not such as to be very suspicious. No witness is called to show any facts or declarations tending to contradict the bankrupt, and his examination, as it comes before me, does not impress me unfavorably. I have nothing but the fact that he stopped payment some weeks afterwards, which has any tendency to show an intended preference. While it is by no means improbable that such was the nature of the payments, I cannot infer it from the mere fact of payment. The burden of proof is on the creditor, and has not been sustained.

With regard to the books of account, the bankrupt appears to have kept such as his business of a soapmaker required. I do not understand that this is denied. His books are not exhibited to me, nor is any evidence introduced to show what is considered proper in that kind of business. Taking the whole examination, with the explanations made of some of the earlier answers, I understand that there is no fault to be found with the books, excepting that some sales do not appear on them. This omission is testified by the bankrupt to be accidental, and with no fraudulent intent. Under such circumstances the books cannot be considered to be not proper, unless the omissions are so considerable as to impair the value of the books as records of the business in a substantial and important degree, or as to embarrass the assignee in ascertaining the true state of the debtor's affairs. There is often more danger of fraud and deception in books which are kept with all due formality, and which appear to be properly balanced, than in the omissions of an uninstructed bookkeeper. In this case the omissions are not so serious, as far as the evidence discloses them, as to require me to refuse the certificate. Discharge granted.

G. M. Marston, for the opposing creditor.

E. L. Barney, for the bankrupt.

UNITED STATES CIRCUIT COURT—S. D. NEW YORK.

Creditors replevied certain goods of bankrupt in a State court after petition filed, but on application by the assignees the United States District Court ordered said goods to be delivered to them. On appeal from this order it was

Held, that the title to all property in the actual possession of the bankrupt, at the time of commencement of proceedings in bankruptcy, passed to assignees.

The proper remedy of said creditors was to apply for relief to the United States District Court, or commence action against the assignees in said court.

Petition for review dismissed.

In re HENRY VOGEL.

NELSON, C. J.—This is a petition for the review of a decision by the District Judge in bankruptcy. The petition in bankruptcy was filed on the 5th of October, 1868, by Vogel, and on the 7th he was declared a bankrupt. On the 6th he surrendered to the Register, to whom the case was referred, a stock of goods in store at No. 39 Murray street, New York. Assignees were afterwards duly appointed. Certain creditors of the bankrupt, who had sold to him a part of his stock in trade, upon the ground that he had made a fraudulent purchase of the same, replevied the goods in a State court on the 6th of October, and also on the 10th. The assignees claimed that the title of the goods had vested in them, and petitioned the judge for a delivery of them into their hands. The judge made an order accordingly. It is from this order that the appeal has been taken. The question involved has been several times before us, not, perhaps, in the precise shape in which it is now presented, but presenting substantially the same principle; and that is, whether or not all property of the bankrupt, in his actual possession at the time of filing the petition in bankruptcy, does not pass into the hands of the assignees the instant they are appointed? We have regarded the several provisions of the Act of Congress specially referred to in the opinion of the judge as decisive in favor of the affirmative of this question. The 38th Section provides that the filing of the petition shall be deemed and taken to be the commencement of proceedings in bank-

ruptcy under the act; and the 14th Section, that the assignment of the estate of the bankrupt made to the assignee shall relate back to the commencement of the proceedings in bankruptcy; and that, thereupon, by operation of law, the title to all such property and estate, real and personal, shall vest in the assignee. Nothing can be more specific and decisive on the question, and there are no other parts of the act, when rightly understood, varying the legal effect of these sections. The proper remedy for the creditors, under the circumstances, was to apply to the District Court for relief, or to await the appointment of the assignees, and institute a proper action against them in the District or Circuit Court. The petition for review dismissed.*

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

A witness, who was a lawyer, being under examination, was questioned touching a certain conveyance made to him by the bankrupt and wife, and a subsequent conveyance by him to the wife, and refused to testify thereon as matter within the privilege of confidential communications between attorney and client.

Held, on the facts stated, the questions were proper and must be answered, and are not within such privilege.

In re GARRETT S. BELLIS & JAMES MILLIGAN.

THE attorneys for Edward C. Williams, assignee of the said bankrupts, claim the right to examine a witness in the above-entitled cause, concerning a deed executed by James Milligan, one of said bankrupts, and Elizabeth, his wife, to one John T. Gray, between the 1st days of January and July, 1868; the consideration that passed between the said parties to this deed, and the property conveyed; also concerning a deed executed by —— ——— to Elizabeth R. Milligan, wife of James Milligan, between the 1st days of January and July, 1868, the consideration and the property conveyed.

On the 8th day of April, 1868, James Milligan and Eliza-

* See Post *in re* Gregg, —— *octavo; Davis* v. *Anderson*, 6 N. B. R., 145; *Stuart* v. *Hines*, 6 N. B. R., 416; *Miller* v. *O'Brien*, 9 N. B. R., 26.

beth, his wife, executed a deed conveying certain property, situate in the city of Brooklyn, State of New York, to —— ———, of New York city.

On the 10th day of April, 1868, the said —— ——— conveyed the same property to Elizabeth R. Milligan, wife of said James Milligan.

Q. 1. State whether James Milligan, one of the bankrupts, conveyed to you by deed, on or about the 8th day of April, 1868, certain real estate situated in the city of Brooklyn?

Q. 2. State the consideration, if any, given by you to him therefor?

Q. 3. State whether you simultaneously, on or about the same date, by deed, conveyed to Elizabeth R. Milligan, wife of said James Milligan, the same premises so conveyed to you by James Milligan, on or about the 8th day of April, 1868?

Q. 4. State the consideration, if any, given to you by Elizabeth R. Milligan therefor?

Q. 5. State whether at that time any suit or action at law was pending in relation to the said real estate between the said James Milligan and wife, and any person in which you were attorney or counsel of Mr. and Mrs. Milligan, or whether there has, since that 8th day of April, 1868, been such an action pending in relation to said real estate, in which you were attorney or counsel?

—— ——— is an attorney in all the courts; being called as a witness in the matter of Bellis & Milligan, bankrupts, refuses to testify concerning the above said transfers, on the ground that they were made in the course of his professional business, and are therefore within the privilege of confidential communications between him and his clients.

The examination of —— ———, as a witness, in this matter, does not involve any statement, confidential or otherwise, made by James Milligan to him, or any advice given by him to his client, the said James Milligan, but merely the part he performed in a business transaction wherein he was grantee in the first place, and grantor in the second, of certain real estate, as hereinbefore mentioned.

In this case the witness claims that the rule which protects professional communications of clients to their attorney, or counsel, extends to all business communications as well as those appertaining to suits in law or equity, or other judicial proceedings. Upon examining the authorities, I find that in the early history of litigation parties prosecuted or defended their suits in person. In the progress of time, as litigation increased, and judicial proceedings became settled and established, men skilled and learned in the law and practice of the courts, were employed to conduct the prosecution and defense of causes. Parties were not then compelled to testify, and hesitated to communicate the facts in relation to their causes to others; to obviate that difficulty, the courts adopted the rule in relation to professional communications of clients to their attorneys, exempting the same from disclosure, etc. Among the early cases upon this subject is that of *Annesly* v. *The Earl of Anglesea*, before the Barons of the Irish Exchequer. (17 How. St. Trials, 1139.) The case was most extensively and ably argued, and very elaborately considered by the court, and the conclusion arrived at as to the true origin of the rule in question, may be best stated in the language of Mr. Baron Montenay, who says, at page 1240, " Mr. Recorder has very properly mentioned the foundation upon which it hath been held, and it is certainly undoubted law, that attorneys ought to keep inviolably the secrets of their clients, viz.: That an increase of legal business and the inability of parties to transact that business themselves, made it necessary for them to employ other persons who might transact that business for them. That this necessity introduced with it the necessity of what the law hath very justly established, an inviolable secrecy to be observed by attorneys, in order to render it safe for clients to communicate to their attorneys all proper instructions for the carrying on of those causes which they found themselves under the necessity of intrusting to their care."

In the case of *Dickens* v. *Parmelee*, 2 Vermont R., 185, Paddock, Justice, says: " It also became necessary for courts to adopt a rule by way of pledge to suitors, that their secret

and confidential communications to their attorneys should not be drawn from them with or without the consent of such attorney." Among the earliest cases to be found on this subject, are *Berd* v. *Lovelace*, Cary's R., page 88; *Austin* v. *Vesey*, *Ib.*, 89; *Kilway* v. *Kilway*, *Ib.*, 126; *Dennis* v. *Codrington*, *Ib.*, 143. Solicitors and counsel were excused from testifying on the ground that they were solicitors or counsel in the cause. In *Waldron* v. *Ward*, Stiles R., 449, a witness was offered in evidence to be examined as to some matter "whereof he had been made privy as of counsel in the cause." The courts would not permit the examination. In *Sparks* v. *Middleton*, Redley, 505, counsel for the defendant was excused from testifying on the ground "that he should only reveal such things as he either knew before he was of counsel, or that came to his knowledge since by other persons." In *Curtis* v. *Pickering*, 1 Ventr., 197, a witness was called to testify concerning an erasure in a will, supposed to have been made by Pickering. The witness, after the erasure, was retained as his solicitor in the cause. In *Valliant* v. *Dodermead*, 2 Atkins, 524, witness was called to prove certain interrogatories. Objections, that his knowledge of the matters was obtained as a clerk in court. Evidence received. Lord Hardwicke says: "That the matters inquired after by the plaintiff's interrogatories, were antecedent transactions to the commencement of the suit." In the then last cited cases, the communications to the respective parties were during the pendency of an action in which they were either attorney, solicitor, or counsel. The same rule is held by the courts in this State, and seems to decide the question in this case. In 17 Johnson, 335, the court says: "The privilege, in its most comprehensive sense, is not broad enough to cover collateral facts, the answer to which does not betray any confidential communication between attorney and client."

An attorney or counsel may be called on to testify to a collateral fact within his knowledge, or to a fact which he might know without being intrusted with it by his client. *Johnson* v. *Daverne*, 19 Johnson, 134, 4th Term, 431.

Communications made to an attorney at law with a view

to obtain his assistance in the commission of a felony, are not privileged; 3 Barb., 598. In the case of the *Rochester City Bank* v. *Suydam*, 5 Pow., page 254, *held:* To be brought within its protection, if they do not appertain to any suit or legal proceeding commenced or contemplated, they should be made under cover of an employment *strictly professional*, and should be such as the business to be done requires to be made. They should also be of a confidential nature, and so considered at the time, and should be shown to have been made with direct reference to the professional business upon which they may be supposed to bear. 17 How., State Trials, 1139. 1 Greenleaf, Ev., 244. 1 Phillips, Ev., 145. 1 Starkey.

In Section 26 of the Bankrupt Act, 1867, it is provided that the court may, at all times, require the bankrupt, upon reasonable notice, to attend and submit to an examination on oath, upon all matters relating to the disposal or condition of his property; the bankrupt is, therefore, liable to be called (and in this case has been called), and examined upon these very transactions. He cannot extend an immunity to his attorney which he does not possess himself. The privilege is for the benefit of the client, not the attorney. The authorities upon this point, which I have cited, show that originally no communications were protected as confidential professional communications, except that which related to the management of some suit or judicial proceeding actually pending, or about to be commenced, in some court. Few cases have gone beyond that. Even in the case of *Wilson* v. *Troup*, 7 Johnson, Ch. R., 25, and S. C., 2 Cowen's R., 195, where Haight, an attorney, was retained to conduct the foreclosure of a mortgage by advertisement, under the act concerning the foreclosure of mortgages by advertisement, and it was claimed that Troup employed Haight because Haight was a lawyer, the Court of Errors evidently considered the relation of the parties in the statutory foreclosure case as that of attorney and client, and *therefore* the evidence of Haight was not admissible as against Troup, his client. This decision is unquestionably correct, and founded upon the principle, that a statutory foreclosure of a mortgage by advertisement

is in the nature of a judicial proceeding. And in *Jackson* v. *Dominick*, 14 Johnson's R., 443, the court says, "That a foreclosure under the statute is substantially equivalent to a foreclosure in equity, same in effect." 5 How., P. R., 261.

In this case there was no action pending. The witness drew a deed, conveying certain real estate from James Milligan to himself. He then conveyed the said real estate to Mrs. Milligan, the wife of said James Milligan. There was no action then pending in regard to said real estate, and the question before the court in relation to said real estate now is, whether the legal title of the real estate so conveyed vests in Mrs. Milligan as against the assignee in bankruptcy. Now, the witness is simply called upon to state the fact of the receiving and the conveying of the real estate, the consideration, if any, he gave or received therefor, and what was said and done on the occasion. His testimony, if given, cannot do injustice to any one. The same facts have been proven by James Milligan in these proceedings. The deeds can be given in evidence, and although Mrs. Milligan cannot be compelled to testify to these facts in bankruptcy, still she can be made to do so by a bill in equity, on the part of the assignee against herself, her husband, and the witness, to set aside said conveyance as fraudulent, etc., etc., as against the assignee in bankruptcy. 30 Barbour, 506. The Court of Appeals, in 30 N. Y., p. 330, Sheldon, Justice, holds, that the rule which protects professional communications of clients to their attorneys or counsel from disclosure, should only extend to such communications as have relation to some suit or other judicial proceeding, either existing or contemplated.

The testimony in this case is claimed only for the bankrupt, which brings it within the cases of *Griffith* v. *Davis*, 5 Barn. and Ald., 502; *Shore* v. *Bedford*, 5 Man. and Gran., 271; *Weeks* v. *Argent*, 16 Mees. and Wels., 816. In 30 N. Y., Ingram, J., says, "If he was only the counsel of Barney, then the decisions settle, that the disclosures being made in the presence of a third party, they are not privileged." I think that for the purposes of this case Mrs. Milligan, the wife of the petitioner, who re-

ceived the conveyance from the witness as property to her sole and separate use, must be considered as a third person. I have given the authorities as they were previous to the Legislative enactments in this State, in relation to the examination of parties as witnesses, which enactments are as follows: "Any party in any civil suit or proceeding, either in law or equity, had before any court or officers, may require any adverse party, whether complainant, plaintiff, petitioner, or defendant, or any one of said adverse party, any and every person who is beneficially interested in said suit or proceedings, though not nominally as parties, to give testimony under oath in such suit or proceeding; and such adverse party may be examined orally, or under a commission, in the same manner as persons not parties to such suit or proceeding, and who are competent witnesses therein; and such party may be subpœnaed, and his attendance as a witness compelled, or he may be examined by a commission, or conditionally, or his testimony perpetuated in the same manner as any competent witness.

"The court or officer before whom such suit or proceeding may be had, shall have power to dismiss the bill, petition, or proceeding of any party, or any part thereof, with costs, or nonsuit any party, or strike out, or disregard any defense, or any part thereof, of any party who shall refuse to testify.

"Any party in any suit or proceeding as aforesaid, shall be required, to entitle him to examine the adverse party as a witness in any suit or proceeding, to give testimony therein, in the same manner as the attendance of witnesses in ordinary cases."

The Act of Congress, July 16th, 1862, provides:

"That the laws of the State in which the court shall be held, shall be the rules * * * as to the competency of witnesses in the court of the United States."

In this case the rights and privileges of the attorney, and his duty to his clients, are entirely separate, and distinguished from his rights and duties as purchaser and vendor. The transaction in relation to the purchase and sale of the real estate was not a part and parcel of, or in and about any lawsuit in which

he was counsel, for either the petitioner or his wife. It therefore stands as a transaction of purchase and sale of real estate, the witness purchasing the real estate of Mr. Milligan, and selling the same to Mrs. Milligan, his wife, two days thereafter.

It is claimed by the assignee in bankruptcy, that this was a mere fraud and cover, and intended to evade the Act of the Legislature of 1849, page 528, chapter 375, viz.:

"Any married female may take by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey, and devise, real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof in the same manner, and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband or be liable for his debts."

The assignee also claims that the conveyance from the wit ness to Mrs. Milligan is void; that it was a mere formal trans fer of the real estate from the husband to the wife, using the name of the witness as a mere go-between, so that the conveyance might technically conform to the letter of the statute, and at the same time defeat the spirit and intent of the law; that the wife acquired no legal or vested rights therein by said conveyance other than her contingent right of dower to which she was previously entitled. The courts ever have, and now do hold, that the character of their attorneys should be above reproach and beyond suspicion; that they should never be a party to the perpetration of any fraud, or any act of doubtful integrity, or in the remotest manner violating any of our country's laws. The reasons for this are obvious. They in most instances draft, if they do not make, the laws, and most certainly, "the law makers should not be law breakers." In all well-regulated communities the lawyers are looked up to and respected. It is just and right they should be. They are the best educated men, better versed in the whole policy of our country, are more intelligent, and have broader, and more enlarged views of all the relations of life than any other class

of men; therefore it is that the community requires of them, in all their relations in life, to be entirely free from any wrong or any act of doubtful propriety. All must see the impropriety of lawyers being connected with any conveyance of real estate, the purpose or effect of which would be to evade the provisions of any law.

I find that previous to the act of 1847, and the acts amendatory thereof, an attorney occupied the same relative position as his client in relation to giving testimony, and was privileged only as to matters which his client could not be compelled to disclose.

But now, whenever and wherever the client can be compelled as a witness to testify to any fact, then the attorney must also testify; the statutes of this State having abrogated the former common-law rule to that effect.

That the witness in this case is not privileged—as the mere act of receiving and conveying the title to real estate about which there has not been any action pending, does not bring him within the former common-law rule as to privileged communications to attorneys and counsel—and since the Act of 1847, no such privilege exists which can be claimed for the witness in this case.

That the questions are pertinent to the issue, and proper, and the witness must answer.

JOHN FITCH, *Register.*

BLATCHFORD, J.—On the facts stated by the Register the five questions set forth were proper, and must be answered by the witness, and are not within the privilege of confidential communications between attorney and client.

UNITED STATES DISTRICT COURT—E. D. NEW YORK.

S., a member of a dissolved copartnership, filed petition against the other member, W., in involuntary bankruptcy, stating that there had been no settlement between them, and claiming that the alleged bankrupt was indebted to the petitioner by reason of the partnership transactions, for

assets and money of the partnership that had come to the said W. over and above his share thereof, and otherwise, in the sum of seven thousand dollars.

Held, That S. is not entitled to an adjudication of bankruptcy against W. upon the facts.

S. is not entitled to prove a debt against W. in respect to bonds and mortgages given by himself and W. jointly.

Such petition cannot be maintained by S. upon a contingent debt or contingent liability.

Semble, That a fraudulent misappropriation of partnership funds by a copartner entitles the innocent partner to treat the act as foreign to the copartnership business, and to prove the debt as if the copartnership had not existed.

In the matter of the petition of WILLIAM P. SIGSBY *v.* ALEXANDER E. WILLIS.

HALL, J.—The petition in this case alleges that the petitioner and the alleged bankrupt were partners in business for some time previous to April 3d, 1869, and that on that day their copartnership was dissolved; that no settlement has been made between them, but that the alleged bankrupt is indebted to the petitioner "*by reason of such partnership transaction for assets and money of said copartnership* which have come into the hands of said Alexander E. Willis over and above his share thereof, and otherwise, in the sum of about seven thousand dollars," and this is the alleged indebtedness upon which the petition is based.

In the return of the order to show cause it was insisted that a debt of the character of that thus set forth would not support a petition in bankruptcy against the debtor; there being no legal debt for which an action could be maintained at law, but only a right to compel an action in a court of equity.

Under the earliest English Bankrupt Acts, this decision would have been fatal. Under these acts it was held that debts recoverable in a court of equity only would not support a commission in bankruptcy, even though provable for the purposes of a dividend; and that one partner could not petition against another partner in respect to any indebtedness arising out of the transactions of the copartnership, unless the debt was such that he might maintain an action at law. Christian's Bankrupt Law, Vol. I., 2352–56, notes, and Vol. II., 475; *ex parte* Nokes, 2 Mont., 148; *ex parte* Hillyard, 1 Atkins, 147;

S. C., 2 Vesey, senr., 407; Medlicott's Case, Strange, 899; *ex-parte* Lee, 1 P. Williams, 783; Murphy's Case, 1 Schoales & LeFroy, 44; *Jeffo* v. *Wood*, 2 P. Williams, 128; Eden on Bankrupt Law, 42, 43; *Marson* v. *Barber*, Gow on Partnership, 17; Henley's Digest of Bankrupt Law, 42, 43; Suttor's Case, 11 Vesey, 163; Broadhurst's Case, 19 Eng. Law and Equity Rep., 466; *Windham* v. *Patterson*, 1 Starkie, 115.

The English courts have, however, repeatedly held that an equitable debt might be proved under a commission obtained by another creditor, although such debt would not support a commission. James' Bankruptcy, 87, *ex parte* Yonge, 3 Vesey & Beame's, 31; *Jeffo* v. *Wood*, 2 P. Williams, 128; Murphy's Case, 1 Sch. & LeFroy, 44; 2 Christian's Bankrupt Law, 473, 474; and also that a solvent partner, winding up the partnership concern, was entitled to prove, under the commission against bankrupt partners, the share of the loss which each partner ought to have borne as a debt against his separate estate. *Ex parte* Watson, 4 Maddock's Rep., 477. And the same rule would appear to be established in this country under the Bankrupt Act of 1841. *Butcher* v. *Forman*, 6 Hill's (N. Y.) Rep., 583. In the case last mentioned, the English authorities which support the position that solvent partners of the bankrupt, having paid all the joint debts of the firm, are regarded as standing in the light of *sureties*, or persons liable for him, and, therefore, entitled to come in and prove in respect to the bankrupt's share of the copartnership debts (Eden on Bankruptcy, 177; *ex parte* Yonge, V. & B., Vol. III., p. 31; *Aflalo* v. *Fourdrivier*, 6 Benj., 306), were approved, and the discharge was said to be a good bar to an action for contribution, when the debt of the firm was paid by the solvent partner after the bankrupt's discharge.

These decisions of the English Courts were made under English statutes, which are probably different in some material respects from our present Bankrupt Act, in regard to the persons who may become petitioning creditors. Under our present statute it is only necessary that the petitioning creditor should have a "*debt provable under the act*," to the required

amount, and the question to be determined is, whether the debt set forth in the creditor's petition is so provable.

It is averred in the petition that the debt of the petitioner is so provable, but the nature of the petitioner's demand being stated in the manner above set forth, the question to be determined is one of law, and not of fact merely; and the court is therefore called upon to determine whether such a debt is provable under our present Bankrupt Act.

The petition concedes that the indebtedness grew out of the copartnership transactions, and that no settlement has been made between the parties. It does not allege that all the copartnership debts have been paid, or that all the copartnership property has been disposed of; and, as it alleges the indebtedness to be in part for assets of the copartnership which have come to the hands of the alleged bankrupt, without alleging that they have been disposed of, there is ground for the inference that such assets are still in the hands of the alleged bankrupt. If so, they are liable to the payment of the copartnership debts; and by a proceeding in equity for an account, and also for a receiver and an injunction, this property may be secured for the payment of joint creditors, in which case the alleged bankrupt could not be properly charged therewith, nor, in case he should be adjudged a bankrupt, could such assets, if still the property of the copartnership, be charged to him as between him and his former partner, so as to become the property of the bankrupt, and thus swell his separate estate, out of which his individual or separate creditors would be paid, to the prejudice of the creditors of the copartnership.

Considering these statements of the petition in the light of the English decisions, and also the omission of such allegation as would make the petitioner's debt provable against the separate estate of the alleged bankrupt, under the rules which govern the administration of copartnership and separate estate, in bankruptcy, I am strongly inclined to think that this allegation of the petition is insufficient, and that the petitioner is not entitled to an adjudication upon the facts alleged in his petition. And in respect to this allegation of indebtedness, the amended

petition heretofore filed is in substance like the original petition, and gives to the petitioner no stronger case against the alleged debtor.

The petitioner has asked leave to file a supplemental or second amended petition, for the purpose of amplifying and making more particular the statement of the nature of the petitioner's demand against the alleged bankrupt, and this proposed amended petition, which is duly verified, sets out that the petitioner and the alleged bankrupt entered into copartnership about the 1st day of February, 1867, in the milling and flouring business, and that, at the time of forming such copartnership, the petitioner purchased of said Willis one-half of a certain real estate, mill, and water privilege, etc., and received a conveyance thereof, and paid said Willis ten thousand dollars therefor; that about the 1st day of April, 1867, the petitioner and Willis executed and delivered to one Wessel T. B. Van Orden a mortgage upon said real estate, to secure the payment of seven thousand dollars and interest, which was due from their said copartnership to said Van Orden, and on which the sum of seven thousand dollars and interest, from the 1st day of April, 1869, is still due; that on the 28th of December, 1868, Willis, without the knowledge of the petitioner, executed and delivered to Noble H. Johnson a mortgage upon said Willis's undivided interest in the premises, for securing the sum of four thousand dollars, being for the individual debt of said Willis; that on or before the 1st day of December, 1868, their said firm became indebted and embarrassed, and effected a compromise with their creditors, by which their creditors agreed to take fifty cents on the dollar of their demands, which said Johnson agreed to pay to such creditors, and that thereupon the petitioner and Willis, to indemnify said Johnson against his said liability, turned over and delivered to him certain accounts and other personal property worth about five thousand dollars, and also, on the 30th of March, 1869, executed and delivered to him their bond and a mortgage upon said real estate, to secure the payment of three thousand seven hundred dollars; that the said firm now owes

no debts except said seven thousand dollars and interest to said Van Orden, and the said indebtedness to said Johnson, which will not exceed the sum of six thousand dollars; that one-half of said indebtedness of thirteen thousand dollars belongs to Willis to pay, but that the petitioner is legally liable to pay the whole amount that may become due on the mortgage to Van Orden, and said three thousand seven hundred dollars mortgage to said Johnson upon the bonds given by him as aforesaid; that by reason of said seven thousand dollars given by Willis to said Johnson, and the insolvency of Willis, the petitioner is in danger of being compelled to pay all that may be due on the said three thousand seven hundred dollars mortgage to Johnson, etc.

This supplemental or amended petition further states "that without reference to said liability of your petitioner for said Willis's share of said partnership debts, said Willis is indebted to your petitioner in a sum not less than seven thousand dollars; that the said Willis had entire charge of the books of said firm, and kept the same falsely and fraudulently; that your petitioner has discovered since the dissolution of said partnership that said Willis, at various times during said partnership, drew funds from the Coxsackie Bank belonging to the said firm, amounting to upwards of eight thousand dollars, and from the Catskill Bank, funds belonging to the said firm, amounting to seven thousand five hundred and forty-six dollars, no part of which sums was charged to said Willis, or appeared at all upon the books of said firm, but which sums were, as your petitioner believes, fraudulently appropriated to his own use by said Willis."

It was insisted upon the argument that the petitioner was entitled to prove a debt against the alleged bankrupt in respect to the bonds and mortgages given by him and the petitioner jointly, under the provisions of the nineteenth section of the Bankrupt Act, which provides in substance that "any person liable as bail, surety, guarantor, or otherwise for the bankrupt * * * and who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the

creditor shall fail or omit to prove such debt, prove the same, either in the name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules;" but, as no such rules have been established, and as this provision may not in any event be deemed to authorize the party so liable to petition against the debtor, it ought probably, to be held to authorize proof by the party so liable only in a case where the real creditor could prove, and as the creditor could not prove in this case, because he has security upon the property of his debtor, I am of the opinion that this provision of the statute does not aid the petitioner.

Nor do I think that the petitioner can sustain his position on the ground that he has a contingent debt or a contingent liability against Willis. It can hardly be supposed that it was intended that a petition against a debtor should be maintained upon the allegation that upon a certain contingency which might never happen, the party proceeded against would become a debtor. The provision that authorizes an application to the court to have the present value of the debt or liability ascertained, only authorizes proof for the amount so ascertained, and it is, to say the least, very doubtful whether, in a case like the present, there is any provable debt within the meaning of the statute, until the amount is so ascertained. I should not therefore be inclined to maintain the petition on either of these grounds.

The other allegations of the proposed supplemental or second amended petition, remain to be considered. They are not sufficiently full and precise; as it is desirable, if not necessary, that in such a petition the precise amounts and the time of each fraudulent withdrawal and fraudulent misappropriation of copartnership funds, without any entry on the books of the firm, should be specifically alleged, so that a distinct and defined issue can be presented by the respondent's answer; and it should be so drawn and the original petition be so amended, as not to concede that an indebtedness caused by such fraudulent misappropriation arose out of the copartnership transactions.

This proposed amendment will therefore be considered as an affidavit in support of a motion for leave to file proper amendments, setting forth particularly, and in due form, the facts stated generally in the petition, and in that view the question whether such an amendment would present a debt or demand on which a petition can be maintained, will be considered.

The fraudulent misappropriation of the copartnership funds which is charged against Willis was of course wholly unauthorized by the contract of copartnership, and is of the nature of an embezzlement of the petitioner's share of such funds; and both common sense and high judicial authority would justify the proof of the amount of the interest of the other parties whose funds were misappropriated against the separate estate of the wrong-doer. *Ex parte* Yonge, 3 Vesey and Beames, 31, and cases there cited. The partner thus wronged by such dishonest and fraudulent acts of his copartner is entitled to treat the misappropriation as entirely foreign to the copartnership business, and prove the debt precisely as though the copartnership had not existed, for in no just sense can a debt created by such fraudulent misappropriation of copartnership funds be considered as arising out of the partnership transactions. Leave to file proper amendments to his petition is therefore given to the petitioner, upon the payment of twenty-five dollars costs, etc., to the respondent; such payment to be made, and the amended petition to be filed, and a copy to be served on the attorney of the respondent within fifteen days from the entry of the order, and the further hearing in this matter is postponed until the 7th day of September next.

Mr. Hale, of Albany, for the petitioner.

Geo. Gorham, of Buffalo, for the respondent.*

* Compare with *in re* Blundin, 5 N. B. R., 42.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

A lien creditor cannot be required to surrender until his liability or debt is discharged.

In re Buse.

Scheele was served with a rule to show cause why he should not deliver to assignee two horses belonging to the bankrupt, or pay the value of the same. On return of the rule it appeared that Scheele had purchased of the bankrupt two horses, for which he paid three hundred and fifty dollars cash, and that at request of Buse he became security in an appeal from a judgment rendered by a Justice of the Peace for two hundred dollars, and that the bankrupt had deposited with him two hundred dollars, to indemnify him against his liability as a security in the appeal bond, and that the suit was still pending on the appeal.

Per Curiam.—It appears that the horses were sold and purchased in good faith before the commencement of the proceedings in bankruptcy, and paid for in cash. For the two hundred dollars deposited with Scheele to indemnify him as a security in the appeal; as the suit is still pending, and the security may be called upon to pay the debt, this proceeding is premature; for, until his liability is determined, the creditor may retain the pledge. Rule discharged.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

Final discharge refused, although no opposition.—If the court, upon examining the record upon an application for a final discharge, perceives that the bankrupt has done any act which under the statute would be a bar to the granting of a certificate, it will refuse to make the order for a discharge, although no creditors appear in opposition. A decree or judgment of the court during the progress of the cause, determining that the bankrupt has done any act which would prevent the discharge, will operate as an estoppel. In some cases the party may be allowed to explain an act, and to show that while it was fraudulent in law it was not so in intent.

Fraudulent Suspension.—If a debtor is guilty of fraudulently suspending the payment of his commercial paper, proceedings may be immediately taken by his creditors to have him adjudged a bankrupt without waiting for the lapse of fourteen days. The Bankrupt Act, Section 39, provides for two classes of cases—a fraudulent suspension, and a suspension of payment for fourteen days without resumption—for either of which a merchant or trader may be adjudged a bankrupt.

In re Sohoo.

A PETITION in involuntary bankruptcy was filed by creditors, alleging that the debtor, "being a merchant, had fraudulently suspended payment of his commercial paper, and had not resumed within fourteen days." The debtor appeared and confessed the charge, and a decree was passed adjudging him a bankrupt, upon which he filed his schedules and surrendered his property, and complied with all the provisions of the statute. Upon an application for a final discharge, the Register reported him entitled thereto, no creditors appearing in opposition, but the court, upon examining the record, decided that he had been guilty of a fraud upon the act, and could not be discharged. The bankrupt filed his petition for a re-hearing, based upon a *fidants*, stating, that in confessing the act of bankruptcy, he had not supposed himself to be doing anything more than confessing that he had stopped payment of his commercial paper for fourteen days, and was unable to resume, and that he did not intend to admit that he had been guilty of any actual or intentional fraud.

The court granted the motion for re-hearing, and the creditor being called to the stand testified, that he did not know of any fraud committed by the bankrupt in his suspension, except the non-resumption within fourteen days, and that he had made the proof under the advice of counsel, supposing that the non-resumption within the time limited was a fraudulent suspension.

TREAT, J.—The act, Section 39, provides for two classes of cases: First, the fraudulent suspension by a merchant or trader of the payment of his commercial paper; and second, the suspension of payment for fourteen days without resumption. In the former case the debtor is supposed to be guilty of suspending fraudulently, with a fraudulent intent, and proceedings

may be immediately commenced to have him adjudged a bankrupt without waiting for the fourteen days to elapse, for if that time was granted him he might complete his fraudulent act, and remove his property beyond the jurisdiction of the court. In the latter case, if he is unable to resume payment of his commercial paper within the fourteen days, the law considers the merchant insolvent, and declares him a bankrupt.

In this case, as it appears that no fraud was intended by the bankrupt, and the creditor testifies that the only fraud known to him is the mere non-payment of the debtor's commercial paper, the discharge will be granted.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

A general assignment by a debtor of all his estate and effects is not of itself merely an act of bankruptcy, but when the debtor is for other causes adjudged bankrupt, his assets will be administered under the provisions of the Court in Bankruptcy.

When a petition for an injunction against other parties than the debtor is united with a petition in involuntary bankruptcy, the injunction will be only provisional, until the court can act upon the petition to adjudge the debtor a bankrupt, and a bill must then be filed to secure the relief sought against parties other than the bankrupt.

In re KINTZING.

PETITIONING creditors filed their petition to adjudge Kintzing a bankrupt, alleging as acts of bankruptcy, that, being a merchant, he had suspended payment of his commercial paper and had not resumed within fourteen days; that he had made payments to divers creditors with a view to give them a preference, and that he had made a general assignment of all his estate to John W. Pritchard for the benefit of all his creditors under the statute of the State, with a view to avoid the effect of the Bankrupt Act, and prayed for an injunction against any disposition of the property by Pritchard.

The court issued a rule upon the debtor to show cause on September 30, why he should not be adjudged a bankrupt, but

holding that the assignment being for the benefit of all the creditors generally was not an act of bankruptcy.

The court issued an order upon Pritchard restraining him from making any payments, even for expenses, until the further order of the court, but permitting him to go on and make sales of the stock of goods assigned.

The court called the attention of the counsel to the fact, that the petition for an injunction was combined with a petition to adjudge the debtor a bankrupt, and that the injunction must fall, when the debtor is adjudged bankrupt; and that if it was intended to take any action against the assignee a separate bill must then be filed, as the injunction issued upon the present petition would be only provisional. That when the debtor shall be adjudged bankrupt, his assets must then be administered under the provisions of the Bankrupt Law.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

Preference—Conveyance out of the usual course of business.—Although a security given to a creditor by mortgage be out of the usual course of business of the debtor, yet, unless the creditor know of the insolvency of the debtor or have reasonable cause to believe him insolvent, the security will be valid, and may be enforced, although the debtor may have been in fact insolvent at the time the security was given.

Creditor must enforce his security in bankruptcy. Sale without authority may be confirmed upon terms.—A creditor of a bankrupt holding security by mortgage or deed of trust cannot enforce his security after the commencement of proceedings in bankruptcy until he first prove his debt and receive permission of the court. If he proceed without authority of court the sale will be invalid, and will be set aside, or upon application for good cause the court may confirm the sale upon terms after the debt is properly proved.

JOHN R. LEE, *Assignee in Bankruptcy of* JOHN H. LUEHRMAN *v.* FRANKLIN AVENUE GERMAN SAVINGS INSTITUTION *et al.*

THE bankrupt, J. H. Luehrman, was a member of the firm of Woerheede, Luehrman & Bro., owning one-third interest in a planing-mill and its business. The firm was solvent. In June and July, 1868, the bankrupt indorsed for the firm of

Th. Kleinschmidt & Co. two notes, one for two thousand five hundred dollars, maturing September 24, 1868, and the other for three thousand five hundred dollars, falling due October, 1868. In August, Kleinschmidt & Co. failed in business, and the bankrupt became exposed to the payment of these notes, amounting to six thousand dollars. In September, the bankrupt applied to the Savings Institution to make arrangements to answer to his liability as indorser for K. & Co., and proposed to the defendant, either to sell or to give a deed of trust upon his interest in the mill and its machinery and fixtures to secure his liability. At the time of making these propositions the bankrupt stated that he owed no other debts than those due defendant, and that he had a right, upon giving three months' notice, to dissolve the partnership; that he was tired of the business, and desired to go into some business that he understood better; that he had put into the firm about six thousand dollars, and considered his interest in the mill to be worth that sum. At the same time he was also the maker of a note with his brother Charles Luehrman, held by defendant, for one thousand three hundred dollars, and was second indorser upon a note of K. & Co. for five thousand dollars, the first indorser being abundantly solvent, this fact being known to defendant. The defendant, after making inquiry as to the value of the bankrupt's interest in the mill, agreed to take the deed of trust, and on the 23d of September, before the maturity of the first note, the bankrupt executed his note for six thousand one hundred and twenty-six dollars and fifty cents, maturing December 31, 1868, and securing the same by a deed of trust upon his one-third interest in the mill, machinery, and fixtures, at the same time notifying his partner that the firm would be dissolved in accordance with the articles, on the 31st of December, 1868. The notes of K. & Co. were then handed to the bankrupt, who left them with the defendant, and on the 30th of September the defendant bought the notes of K. & Co. from the bankrupt for three hundred dollars, applying the money to the credit of the notes of Luehrman & Bro., the bankrupt saying that he had to pay only three hundred dollars, and

that his brother was liable to pay the balance of one thousand dollars.

The liability to pay the indorsements of the note of Kleinschmidt & Co., with what he lost by their failure, made J. H. L. insolvent in fact, although he represented that he could pay all his debts when he settled with the bank.

On the 31st of December, 1868, J. H. L. filed his petition in bankruptcy. On January 5, 1869, the note of six thousand one hundred and twenty-six dollars and fifty cents not being paid, the trustee advertised the property for sale on January 28, and on that day the bank bought in the property for four thousand one hundred dollars.

The assignee in bankruptcy filed his bill to set aside the sale made by the trustee, as having been made after an act of bankruptcy without authority of court; and also to set aside the deed of trust as having been made with a view to give a preference, the defendant having at the time reasonable cause to believe the bankrupt insolvent, the conveyance being out of the usual course of business.

The evidence showed that the deed of trust was made and executed as a security by the bankrupt before his liability as indorser of K. & Co. was fixed, but that the bankrupt stated that he owed no other debts than those due defendant, and that when he became indorser for K. & Co., inquiry was made as to his means, and he was considered as being worth from twelve to fourteen thousand dollars. Meyer, a son-in-law of the bankrupt, and a member of the firm of K. & Co., owed the bankrupt four thousand dollars for money borrowed, which was lost by the failure of K. & Co. The firm of Woerheede, Luehrman & Bro. was solvent, but J. H. L. was indebted to Woerheede for about one thousand one hundred dollars, part of the original purchase of his share of the property of the firm, and was, in fact, rendered insolvent by the failure of K. & Co., and his liability to pay his accommodation indorsements in their favor. The deed of trust did, in fact, give a preference to the defendant over the other creditors.

The court held that, although the deed of trust executed by

the bankrupt did in fact give a prefence to the Savings Institution, yet, that its officers did not at the time know that the bankrupt was insolvent, and did not have reasonable cause to believe him to be insolvent, or to be acting in contemplation of bankruptcy or insolvency, and that the security was valid.

The court further held, as the defendant had enforced its security by a sale under the deed of trust after the filing of the petition in bankruptcy, without proving its debt as secured creditor, the sale was invalid; but as the property had sold for a fair price, and for as large a sum as it would probably bring upon a resale, that upon application of the Saving Institution, due proof of the debt being made before the Register, the sale would be confirmed upon payment of the costs of the suit.

The defendant, upon a subsequent day, made proof of its debt, and applied for a confirmation of the sale, which was granted by the court upon payment of the costs of the suit, and the defendant was allowed to stand as a general creditor for the unpaid balance.

Whittlesey, for assignee.

M. L. Gray, for defendants.

UNITED STATES DISTRICT COURT—W. D. MISSOURI.

1. When a creditor has reasonable cause to believe his debtor insolvent, purchases goods of him, and such debtor makes the sale with a view of giving a preference, the transaction is void, and the assignee in bankruptcy of such insolvent may recover the value of the goods from such creditor.
2. The sale cannot be declared void unless the purchaser had reasonable cause to believe the seller to have been insolvent when he made the sale, and reasonable cause means a state of facts which would put a prudent man upon inquiry as to the condition of the person from whom he purchases.
3. Neither local inclinations nor the employment of the process of State courts can longer be successfully employed to thwart or defeat the equal distribution of an insolvent debtor's estate among all his creditors, regardless of their locality.

In re JOHN R. MCDONOUGH, *bankrupt*, HENRY K. WHITE, *assignee*, *v.* THOMAS J. RAFTERY.

KREKEL, J.—This is an action brought by the assignee under

the first clause of the 35th Section of the Bankrupt Law, to recover property, or the value thereof, alleged to have been conveyed by the bankrupt to defendant Raftery, with a view of giving him, the said Raftery, a preference.

The testimony in the case tends to show that Raftery, an old merchant, on the 1st day of July, 1867, sold his stock of general merchandise to McDonough, after inventory taken, at upwards of eight thousand dollars; that he received in payment four thousand dollars, and two notes of equal amounts due in six and twelve months, Lysaght and McGee becoming securities; that McDonough rented the house in which the goods purchased were kept, of Raftery, the owner; that after keeping store until about November 1, 1868, McDonough sold the stock of goods on hand to Raftery in a lump, and without taking an inventory, for the round sum of five thousand dollars, one thousand three hundred and fifty dollars of which was to be paid on balance of the last of the notes given for original purchase-money, which was unpaid and under protest; eight hundred dollars to bank on overdrawn account; five hundred dollars in cash, and balance in short, negotiable paper. Prior to making the purchase, Raftery had incidentally learned that McDonough was owing upwards of one thousand six hundred dollars to the jobbing house of Tootle, Fairleigh & Co., of St. Joseph. Raftery was well acquainted with the business of McDonough, and on intimate terms with both McDonough and Lysaght, the security for McDonough, and who had had at one time charge of McDonough's business while he was sick. McGee, the other security for McDonough, had been released on notice of his liability on note referred to. A number of witnesses testified that McDonough was considered solvent at the time of sale, that he was in good credit, and had no other property than the stock of goods.

The insolvency of McDonough is admitted, and the first question to be decided is, had Raftery any claim against McDonough, or was he under any liability for him? The last of the two notes given in consideration of the original purchase had been assigned by Raftery to a bank, and when it became

due Raftery, in order to avoid protest, waived it by appropriate indorsement on the note. This created a liability on the part of Raftery for McDonough. The next inquiry is, had Raftery reasonable cause to believe McDonough insolvent when he made the purchase; for, unless this was the case, the sale cannot be declared void. "Reasonable cause to believe," in this connection, means a state of facts or circumstances which would lead any prudent man to the making of inquiries. Raftery knew of the protested note, and, to indicate his own view as to his liability on it, he secures the payment in the trade. He knew of the indebtedness of one thousand six hundred dollars to Tootle, Fairleigh & Co.; he knew of the overdrawn bank account; he knew that the stock of goods had gone down from eight thousand dollars and upwards to five thousand dollars in sixteen months. These facts were well calculated to put Raftery upon inquiry, and, had he made any whatever, he could not have failed to learn the actual condition of McDonough, for one-half of his creditors reside in St. Joseph. The books of McDonough would at once have disclosed his condition; and is it unreasonable that purchasers, under circumstances such as surrounded this case, should be required to make reasonable efforts to learn the condition of the persons with whom they deal? It will not do to ask protection on account of ignorance, when a very small amount of inquiry would have given all necessary information. Raftery, in the opinion of the court, had reasonable cause to believe McDonough to be insolvent at the time of the transfer under consideration.

To make the transaction void, it must also be done by the debtor with a view to give a preference. McDonough certainly knew his own condition of insolvency. His acts of satisfying the Raftery note in the trade, and afterwards distributing portions of the proceeds among his St. Joseph creditors exclusively, too plainly indicate his intention in the matter to admit of doubt.

The court is asked that, should the judgment be unfavorable to defendant, he be allowed, by way of reduction, what-

ever amount was paid by McDonough out of the proceeds of sale to creditors, or, at least, so much thereof as they ratably would have been entitled to on an equal distribution of the estate. The equitable view underlying this argument cannot be made available in this proceeding, for the direction of the law is that the transfer shall be void, and the assignee may recover the property or the value thereof from the person receiving or to be benefited by it. There is also the further objection that it would permit the debtor to make the distribution of his estate, a matter which the Bankrupt Law prohibits. The question whether those who have received payments should refund, and to whom, the court does not undertake to decide, it being outside of the case.

It may not be improper here to remark that neither local inclinations nor the employment of the process of State courts are longer successfully to be employed to thwart or defeat the equal distribution of an insolvent debtor's estate among all his creditors, regardless of their locality.

The conclusions the court has arrived at are, that McDonough, at the time of the transfer, was insolvent; that a liability from him to Raftery existed, and that he made the transfer with a view to prefer Raftery, and instead of the provisions of the Bankrupt Law. The value of the goods is shown by the appraisement of Raftery, and other evidence, to be at least four thousand five hundred and ninety-two dollars and five cents, and judgment will be rendered against him for that amount with costs.

Woodson, Vineyard & Young, attorneys for plaintiff.

Hall & Oliver and *W. Judson*, attorney for defendant.

UNITED STATES DISTRICT COURT—SOUTH CAROLINA.

Creditor upon a note of which slaves were part consideration, filed petition in involuntary bankruptcy against a farmer, charging him with having made fraudulent preferences, being insolvent.

Held, A note made prior to the Emancipation Proclamation, of which slaves

were a consideration, is valid, and the debt will support a petition of creditor in bankruptcy.

To constitute a fraudulent preference where the alleged bankrupt is claimed to be insolvent, he must so be and know himself so to be, and actually intend and actually give a preference to a creditor.

A trader unable to pay his debts in the ordinary course of business is *prima facie* insolvent, and the burden of proof is upon him, in such a case, to show that he is solvent—*Aliter*, as to a farmer, where the petitioner must prove the actual insolvency of the alleged bankrupt.

In re H. C. Miller *v.* J. Crawford Keys.

This was a petition by creditor for involuntary bankruptcy of the respondent upon four counts, only three of which, however, were relied upon as material, to wit: A mortgage of some three thousand one hundred acres of land to one Tompkins, to secure a debt of four thousand dollars; a subsequent conveyance of the same in fee to pay this debt and six thousand dollars more; the delivering up to Keys & McCully of a note for one thousand dollars, to whom respondent owed seven hundred dollars; each count alleging that the transaction specified was made whilst the respondent was insolvent, and with the intent to give a preference. The petitioner claimed two notes, and the position was taken in the outset by the defense, that he had no *status* in court, on the ground that one was paid and the other was "tainted with negro." The testimony was pretty conclusive as to the first, but the last was given for the balance of a large transaction had about the commencement of the war, only a portion of which was negroes. His honor charged the jury that a note for negroes before Lincoln's proclamation took effect was perfectly valid, but that the question did not arise in this case properly, as the note grew out of a mixed transaction, and from the original proportions of the consideration, the respondents, by whatever basis of calculation they might adopt, must owe the petitioner two hundred and fifty dollars, which was enough to establish his right to be in court.

A great deal of testimony was offered on the question of insolvency. The respondent told petitioner, when the latter first demanded payment, after the war, that he was (then) wholly unable to pay—could scarcely live, and the English rule

of technical insolvency was strongly pressed. Various estimates were made of the value of the lands mortgaged (and subsequently conveyed) to Tompkins, but the preponderance of the testimony made them a hard bargain on the whole at fifty cents per acre; the note delivered up to Keys & McCully was shown to have been given for a two-third interest in a similar tract in the mountains of Pickens. It was further shown that at the time this note was re-delivered, the respondent owed K. & McC. about seven hundred dollars, that no credit was given, and they went on furnishing him with supplies and fertilizers, and, as one of the firm said, the respondent's credit had been perfectly good with them, and remained unimpaired, and that no settlement had yet been made. The case was argued at length and with great zeal and ability on both sides.

His Honor charged the jury with great clearness, and very fully. Both parties expressed their satisfaction, and declined to ask special instructions. Without attempting to quote the charge, the court said, in substance, that to make out the case it was necessary that insolvency and a preference must concur. A trader unable to pay his debts in the ordinary course of business, is insolvent, *prima facie*, and it is incumbent on him to show that he is not so in fact. This rule does not apply with the same strictness to the farmer, and as to them this rule is reversed. The petitioner must take the onus of showing actual insolvency. The "preference" must be an advantage actually given to one or more of his creditors over the others, with the knowledge of his situation and the intent to accomplish this end. The "intent" is an element of the objectionable transaction, according to the letter of the law, and though one is presumed to intend the natural results of his acts, the intent is *essential*, and must be shown by his acts and the circumstances. When the respondent sold the land to Tompkins, he believed at least that he was paying a debt of ten thousand dollars, and if he considered these lands of such comparatively insignificant value, it would be hard to believe, upon the estimate of the relative value of his assets and liabilities, that he intended or thought he was giving a preference to this creditor. The solu-

tion of the mortgage is much more difficult, not only on account of the difference of the sum, but also because it was merely a security for that sum, and did not relieve his estate of it by a settlement in full. The Keys & McCully transaction is a peculiar one, and is to be solved by the testimony which you have. No credit was given upon the books, but if, from the testimony, you are satisfied that the seven hundred dollars was paid by the respondent in full, by the re-delivery of the one thousand dollar note, then is not this more than he could pay to others, and to that extent a preference? If you shall conclude that this note was re-delivered to meet the heavy advances of provisions and of fertilizers subsequently made, as well as the debt already contracted, then you may reach a different conclusion. These are questions which it is your peculiar province to solve. The insolvency and the intent to give preference must concur.

The jury returned a verdict of Not Guilty.

McGowan & Perry, Solicitors pro petitioner.

Reed & Trescot, Solicitors pro respondent.

UNITED STATES DISTRICT COURT—SOUTH CAROLINA

Bankrupt was a member of two copartnerships, and without notice to his other copartners, filed his individual petition in voluntary bankruptcy, showing in his schedules assets and liabilities of the two firms. He was adjudicated a bankrupt individually, and assignees were appointed who petitioned that the court adjudge the two firms respectively bankrupt, as being insolvent, in order to the administration of their assets in the bankruptcy court.

The remaining copartners answered, denying the commission of any act of bankruptcy by either firm, and demanded a trial by jury.

Held, the assignees had properly instituted and could maintain the said proceedings.

The bankrupt could not be properly discharged unless the assets of the insolvent firms should be so administered.

If the respondents denied the insolvency of the firms, jury trial would be granted; but not being denied, the said firms would be respectively adjudged bankrupt.

In re JOHN W. GRADY, *Bankrupt*. WM. T. SHUMATE & A.

BLYTHE, *Assignees*, *v.* DAVID O. HAWTHORNE. *Same v.* DAVID O. HAWTHORNE & SIDNEY H. TURBYFILL.

THESE cases involved the same principle, and presented the same state of facts, and were argued together.

John W. Grady, being a member of the firm of Grady & Hawthorne, and of Grady, Hawthorne & Turbyfill, by his attorney, Gov. B. F. Perry, filed his petition for voluntary bankruptcy in December last; and in his schedules showed assets and liabilities in behalf of each of these firms as well as for himself individually. His copartners were not served with a copy of the petition, or in any wise made parties to the proceedings. The petitioners, in the present cases, were appointed his assignees, and filed their petition by William E. Earle, their solicitor, alleging the bankruptcy of Grady, the copartnerships, and the insolvency of the copartnerships respectively, and prayed that the firms might be respectively adjudicated bankrupts, and the assets be administered in the Bankruptcy Court. Gov. Perry also answered these petitions, denying that the parties had committed any act of bankruptcy, and moved that the rule to show cause should be dismissed on the ground that the firms could not be forced into bankruptcy unless they had done something which the act declared to be an act of bankruptcy; that the assignees of Grady could not maintain these proceedings against his late copartners, and that they were unnecessary for the administration of the bankrupt's estate, and that the bankrupt could be discharged from his individual debts without the firms going into bankruptcy.

Capt. Earle, for the assignees, replied at considerable length, adducing a great number of authorities from the reports and bankrupt authors, to sustain the position that Grady could not be discharged from any of his debts until the copartnership debts were paid, or the copartnership assets were administered in bankruptcy; that a copy of Grady's petition should have been served, *ab initio*, on his copartners, as these were copartnership assets; that this not having been done according to the prescribed practice, the assignees had become the only parties who

could proceed to heal the omission; and that, as the agents of the creditors generally, it was their duty to institute these proceedings in order that the estate might be administered according to the Bankrupt Act, and the individual assets be applied to individual debts, and the copartnership assets to the copartnership debts, and that it was unnecessary to allege or prove that the respondents had committed any act of bankruptcy, but that their copartner, Grady, having asked for benefit of the act, it became necessary, if the firms were insolvent, that the assets of the firms should be administered in the Court of Bankruptcy.

Gov. Perry then asked for an order for trial by jury, and read the form of demand for trial by jury, and argued that the parties were entitled to a trial by jury if they desired, and could not otherwise be adjudicated bankrupts. The court refused the motion.

Judge Bryan reviewed the law analytically, and with great clearness, deciding substantially that the bankrupt, John W. Grady, could not be discharged of a portion of his liabilities merely, but that, if at all, it must be of *all* of them, and that this could not be unless the firm debts were paid, or the firm assets administered in the Bankrupt Court; that as Grady's petition had not been served on his copartners, it had become necessary and proper that the assignees should institute these proceedings to bring them in, in conformity to General Orders No. 18; that the estate had to be administered according to Section 36 of the act, and that this could not be done otherwise in the present state of the case than by the proceedings now instituted by the assignees, who are, under the law, the agents of all the creditors; that, if the respondents denied the insolvency of the firms, they were entitled to have that issue tried by a jury, but that it was wholly unnecessary to show any act of bankruptcy on the part of the respondents—the copartnerships being respectively insolvent, and one member of each of them having asked the benefit of the Bankrupt Act, the question before the court became purely a legal one, and that the firms of Grady & Hawthorne, and Grady, Hawthorne & Turbyfill, must, of necessity, be adjudged bankrupt.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Liability as indorser upon a promissory note was fixed upon N., against whom the holder, as creditor, filed a petition in involuntary bankruptcy, charging the commission of certain acts of bankruptcy.

Held, when an indorser's liability has become fixed, such liability constitutes a debt due and payable from the indorser, and may be made the foundation of involuntary as well as of voluntary proceedings in bankruptcy.

Fraudulent suspension and non-payment is necessary to be averred only when the act of bankruptcy charged is that specified in Clause 9 of Section 39 of the act.

Language that N., "being a merchant," is a sufficient averment that he is a merchant under said Clause 9.

The term "commercial paper," as used in the Bankruptcy Act, denotes bills of exchange, promissory notes, negotiable bank checks, paper governed by those rules that have their origin and are established upon the customs of merchants known as the law merchant.

To be a debtor's commercial paper within said Clause 9, the debt which the paper represents must have been incurred by him in his character of banker, merchant, or trader; whether as principal or otherwise, is immaterial.

In re PETER NICKODEMUS.

WITHEY, J.—Thomas P. Sheldon, a creditor, has filed his petition to have Peter Nickodemus declared a bankrupt. The debt made the foundation of the petition, is a promissory note for one thousand dollars, executed by Charles Steinberg, payable to the order of Nickodemus, thirty days after date, at the banking office of petitioner, and indorsed by the payee. The note was not paid, and steps taken which fixed Nickodemus' liability as indorser.

Four distinct acts of bankruptcy are alleged. First and second are sales by Nickodemus of his property with intent to delay, defraud, and hinder creditors; third, that Nickodemus, being a merchant, has fraudulently stopped payment of his commercial paper, and has not resumed the same within fourteen days, to wit: that he fraudulently, about the 24th of February last, refused payment of the before describable note, indorsed by him, and has not paid the same within fourteen days thereafter; fourth, that in contemplation of insolvency, March 8, 1869, Peter Nickodemus made a conveyance to Jacob Nickodemus of his real and personal estate, describing it, with intent to give a preference to certain of his creditors.

Respondent appears and shows cause against the petition: first, by objections, in the nature of a demurrer, to the sufficiency of the allegations thereof; and then, by way of answer, denies the acts of bankruptcy, and demands a trial by jury. The objections to the petition are now to be disposed of.

First. It is objected that the nature of the petitioner's demand is not such as constitutes the foundation of *involuntary* proceedings under the Bankrupt Law. It is claimed that the demand must be one upon which the alleged bankrupt is bound as the *principal* debtor, and not as *indorser* or surety.

This objection is not admissible, as will appear by reference to Sections 11, 19, and 39 of the Bankrupt Act. Section 11 provides that any person "owing debts provable under this act, exceeding three hundred dollars," who files his petition for the purpose, "shall be adjudged a bankrupt." By Section 19, "all debts due and payable from the bankrupt at the time of his adjudication of bankruptcy, * * * may be proved against the estate of the bankrupt."

These provisions establish the right in the debtor to be adjudged a bankrupt on his petition, whenever he is "owing debts, *provable under this act*, exceeding three hundred dollars." What debts are provable is shown, viz.: "*All debts due and payable from the bankrupt* at the time of the adjudication of bankruptcy;" and Section 19 further provides that where the bankrupt is bound as *indorser of a note*, "and his liability shall not have become absolute until the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed."

While the language just read from Section 19 primarily looks to the right of a creditor to prove, *as* a debt against the bankrupt, an indorsed note after it has matured, but which had not at the time of the adjudication of bankruptcy, there is a clear recognition that fixed liability by indorsement of a note, is a "*debt due and payable from the bankrupt*," provable under the act.

This being so, then, whenever absolute liability exists against an *indorser* at the time of filing the petition in bankruptcy, such

liability may be made the foundation for voluntary proceedings.

So far the law speaks of *voluntary* proceedings; but Section 39 applies those provisions to an *involuntary* case. It enacts that "any person owing debts *as aforesaid*," who commits any of the acts of bankruptcy enumerated in this section, "shall be adjudged a bankrupt on the petition of one or more of his creditors." The language, "owing debts as aforesaid," has reference to these words of Section 11, viz.: "Owing debts, provable under this act, exceeding three hundred dollars."

We adduce from the foregoing these conclusions:

First. The foundation of voluntary proceedings is indebtedness due and payable under the act against the debtor.

Second. Whatever debts may be proved in a voluntary, may be proved in an involuntary case.

Third. Whenever an indorser's liability has become fixed, such liability constitutes a debt due and payable from the indorser, which may be made the foundation of involuntary as well as voluntary proceedings of bankruptcy.

Of course there must be shown, in an involuntary case, in addition to such indebtedness, at least one of the acts of bankruptcy enumerated in Section 39. The case of *Lowenstein*, 2 N. B. R., 99 *quarto*, 306 *octavo*, is not regarded as illustrating the point we have been considering. It is too deficient in details to give information of the point decided, if, as is claimed by respondent's counsel, this question there arose.

The second and third objections are to the first and second alleged acts of bankruptcy, viz.: disposing of property "with intent to delay, defraud, and hinder creditors," an act of bankruptcy specified in Clause 5, Section 39. Respondent objects for want of an averment of *fraudulent non-payment* of this indorsement, and want of an allegation that he was *bankrupt or insolvent, or in contemplation of insolvency or bankruptcy.*

Both objections are overruled. Fraudulent suspension or non-payment is necessary to be averred only when the act of bankruptcy charged is that specified in Clause 9 of Section 39. The fourth allegation of the petition charges an act of bank-

ruptcy under Clause 9, and avers fraudulent stoppage and non-payment.

In reference to the other of the last-mentioned objections, we remark that bankruptcy or insolvency, or contemplation of bankruptcy or insolvency, would be a necessary averment under Clause 8, but is not where the act of bankruptcy is charged under Clause 5, when it is sufficient to allege the transfer to have been made "with intent to hinder, defraud, or delay creditors."

The respondent's counsel urged the objections we have just been considering, partly on the ground, if not entirely, that the provisions of Sections 35 and 39 must be construed together and be made to harmonize.

Since the amendment changing "or" to "and" in the last clause of Section 39, there is discovered no conflict between these sections. Section 35 does not relate to, or affect the question—What is an act of bankruptcy?

By Section 39 alone, that question must be answered; whereas Section 35 declares what transfers of property and what preferences are void. It is quite clear that facts which are entirely sufficient for adjudicating a debtor a bankrupt on petition of his creditor, may be and generally are, wholly insufficient to justify a decree declaring void a transfer of property, or preference given to a creditor. The reason is obvious: a transfer or preference is void only when the purchaser or preferred creditor has, at the time, reason to believe that which by Section 35, or the last clause of 39, taints *him* with fraud in the transaction.

That Sections 35 and 39 are in *pari materia*, and to be construed together, so far as necessary to obviate any conflict in the provisions, is not questioned; but no conflict is discovered.

We now look to the fourth objection; and this raises two questions, viz.: Whether by the petition it appears that Nickodemus is a *merchant*, and whether the indorsed note is the *commercial paper* of the respondent.

Clause 9, Section 39, reads as follows:

Any person "who, being a banker, merchant, or trader, has

fraudulently stopped or suspended, and has not secured payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy."

The allegation of the petition is that Nickodemus, "*being a merchant*, has fraudulently stopped payment of *his commercial paper*," etc. The paper is the note made by Steinberg and payable to Nickodemus, and by him indorsed. We regard the allegation substantially to be, that Nickodemus is a *merchant*, and that the indorsed note is his *commercial paper*, etc. The petition is in accordance with Form 54, and is regarded as sufficient.

Respondent's counsel claims that the note is not commercial paper, because given for a loan of money. The note may or may not have been given for a loan of money—nothing is stated in the petition from which to determine, except what can be inferred from the copy of the note. Steinberg is the maker, the date is January 21, 1869. Respondent is payee and indorser, and it is payable at thirty days at the banking office of petitioner. This paper may have been given by the maker to Nickodemus for the purchase of goods, and have been discounted at respondent's request by petitioner. We therefore think the allegation sufficient in both respects. Under a denial of the allegations of the petition, an issue is made, and the proofs will unfold the nature of the transaction, from which it can be determined whether Nickodemus is a merchant and whether the indorsed note is his commercial paper.

The argument of learned counsel involved the question, What is commercial paper within the purview of Clause 9, Section 39? The case of *Lowenstein*, 2 N. B. R., 100 *quarto*, 306 *octavo*, was referred to as authority that a note given for a loan of money is not commercial paper. The facts in that case are not sufficiently stated to unfold the nature of the transaction. The count says: "The Frauenthal notes were not commercial paper; they were not given in the course of, or in connection with the business of the debtors as merchants, but were given for loans of money." We do not regard this case as deciding more than that, in order to be commercial paper of the debtor,

it must be paper given in the course of, or in connection with his business as a merchant, and we fully concur with that view.

Commerce proceeds from trade, and is the exchange of one kind of property for another, whether it be by barter, or by purchase and sale. Strictly speaking, merchants and traders are engaged in commercial pursuits, bankers are not; and yet, within the purview of Clause 9, the latter are regarded as subject to an act of bankruptcy by non-payment of *their commercial paper*. We cannot, therefore, say that only that is commercial paper, within the meaning of the Bankrupt Act, which grows out of and is part of a strictly commercial transaction. So to hold would involve some difficulty in determining that any paper, to which a banker is a party, is *his* commercial paper—he not being engaged in strictly commercial pursuits—though he may be dealing in commercial paper.

Hence, we are of opinion that the term commercial paper is used in the Bankrupt Act to denote bills of exchange, promissory notes, and negotiable bank checks; paper governed by those rules which have their origin, and are established upon the custom of merchants in their commercial transactions, known as the law merchant. Such paper is usually denominated commercial paper, and we must presume Congress used the term in its common acceptation, rather than in a more restricted sense. Under this view, we can understand how the term "*his* commercial paper" was applied to bankers as well as to merchants and traders.

It may be important to notice that, by the laws of Michigan, notes of the character of that set out in the petition are declared to be within the rules governing inland bills of exchange, according to the custom of merchants.

Having arrived at a solution of the question—what is commercial paper within the meaning of the Bankrupt Act?—there is still another question, viz.: when is it "*his* commercial paper?"

We have already said, the allegation in this case, that it is *his*, the respondent's, commercial paper, is sufficient in the pe-

tition, and when denied by answer raises an issue to be tried.

But inasmuch as the question last suggested is intimately connected, under Clause 9, with the discussion of what is commercial paper, it may be advisable to indicate the views of the court as to that question. To be the *debtor's* commercial paper within Clause 9, the debt which the paper represents must have been incurred by the debtor in his character of banker, merchant, or trader.

This being so, it matters not whether the note, bill, or check was given for a loan of money, for goods purchased or otherwise; nor whether the debtor is liable thereon as debtor, acceptor, or indorser—whether as principal debtor or otherwise. It must be commercial paper, and the debtor must be a party thereto, with a fixed liability; and it must be a debt incurred in his character of banker, merchant, or trader. Hence, liability by such person, as a mere accommodation indorser or acceptor, would not be "*his* commercial paper," within the provision of Clause 9, because not a debt incurred in his character of banker, merchant, or trader.

The objections are all overruled. The cause will go upon the issue docket under the general denials of the answer filed, when the facts can be fully disclosed.*

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

A copartnership had carried on business in New York and Massachusetts for two months, within the period of six months before one member, without the consent of the others, filed his petition in bankruptcy, with schedules of individual and copartnership liabilities and assets, praying that petitioner and the firm members be respectively adjudged bankrupt. The firm as such had done business nowhere else, and for no longer time than two months within the period stated.

* That an indorser may be proceeded against in involuntary bankruptcy, see *In re* Clemens, 8 N. B. R., 279. Under the amendment of 1870, it is held to be unnecessary to aver that the bankrupt was a merchant, etc., where the act of bankruptcy is a suspension and non-resumption of commercial paper for fourteen days. *In re* Hercules Ins. Co., 6 N. B. R., 338.

In re Foster & Pratt.

Held, the petition having first been filed in this district, the court has jurisdiction of the firm and its members.

The phrase "longest period" during such six months, means the longest period in which business was carried on in any district during such time, and not the greater portion of the six months.

Though a firm be dissolved, it may still exist *quoad* the creditors, under Section 36, and the several members may be adjudged bankrupt on petition of one, in a proper case, without the consent of the others.

In re ELISHA FOSTER, *petitioner for adjudication of Bankruptcy of himself and* WILLIAM W. PRATT.

BLATCHFORD, J.—On the 4th of December, 1868, Elisha Foster filed a petition in this court, describing himself therein as of the town of Franklin, in the State of Massachusetts. The petition sets forth that the petitioner and Charles C. Day, of Jersey City, New Jersey, and William W. Pratt, of Medfield, Massachusetts, formed a copartnership in November, 1866, for the transaction of the business of manufacturing and dealing in straw goods at said town of Franklin and the city of New York, and have carried on said business as such copartners for the longest period during the six months next immediately preceding the filing of the petition at the city of New York; that the members of said copartnership owe debts exceeding the amount of three hundred dollars, and are unable to pay their debts in full; that the petitioner is willing to surrender all the estate and effects of said copartnership and all his separate estate and effects for the benefit of the creditors of said partnership and of his separate creditors; that the said Day and Pratt are respectively unwilling to join in the petition; that the petitioner desires to obtain the benefit of the Bankruptcy Act; that Schedule A to the petition contains a statement of all the debts of the copartnership; that Schedule B thereto contains an inventory of all the estate of said copartnership; that Schedule C thereto contains a statement of the petitioner's individual debts, and that Schedule D thereto contains an inventory of his individual estate. The prayer of the petition is, that the petitioner and Day and Pratt may be adjudged to be bankrupts, and that the petitioner may have a certificate of discharge. On the filing of this petition an order was made requiring Day and Pratt to show cause why they

should not be adjudged bankrupts. On the return day of such order, each of them put in an answer denying the allegation of the petition that Foster, Day & Pratt had carried on business, as copartners, as alleged, in the city of New York, for the longest period during the six months next immediately preceding the filing of the petition, and denying the jurisdiction of this court to grant the prayer of the petition. Evidence has been taken on the issue thus raised. The copartnership of Foster, Day & Pratt was formed in November, 1866, and thenceforth, until the 4th of August, 1868, carried on the business of manufacturing and buying and selling straw goods, the manufacturing being done in Massachusetts, and the buying and selling in the city of New York and in Massachusetts, the largest portion of the sales being made in the city of New York. The copartnership was dissolved on the 4th of August, 1868, and thenceforward ceased to carry on business. Consequently it carried on business in the city of New York for only two months of the six months next immediately preceding the time of the filing of the petition. By Section 11 of the act, it is necessary to jurisdiction, that the petition be addressed to the judge of the judicial district in which the debtor has resided or carried on business for the six months next immediately preceding the time of filing the petition, "or for the longest period during six months." The sole question in this case is, whether this court has jurisdiction to entertain the petition of Foster, and, under it, to adjudge Foster, Day & Pratt to be bankrupts. Schedule B to the petition shows that there are assets of the copartnership. The members thereof continue, therefore, for the purposes of Section 36 of the act, to be partners in trade *quoad* their creditors, and they may, under that section, be adjudged bankrupts on the petition of any one of them, the others, if they refuse to join in the petition, being brought into court by proper process, under the provisions of General Order No. 18. As the petition of Foster, filed in this court, that the three copartners may be adjudged bankrupt, was the first petition filed in any court for that purpose, it follows, under Section 36, and General Order

No. 16, that this court, if it has jurisdiction of such petition, is entitled to take and retain exclusive jurisdiction over all proceedings in regard to the bankruptcy of all three of the copartners until the same shall be closed. The question then recurs whether this court has jurisdiction of the petition of Foster. It has such jurisdiction if the three copartners have carried on business in this judicial district for the longest period during the six months next immediately preceding the 4th of December, 1868. This involves a determination as to the meaning of the expression, "the longest period" during such six months. It is contended on the part of Day and Pratt that the longest period during the six months must be more than three months in duration, and that, therefore, the two months in this case, from the 4th of June, 1868, to the 4th of August, 1868, during which the copartnership carried on business in this judicial district, is not such longest period. It is urged that two months can never be the longest period during the six months; and that three months and a day is the shortest time that will answer the requirement of the longest period during the six months; and that the expression, "the longest period during such six months," means, the longest part of such six months. I cannot assent to this view. The meaning of the 11th Section is, I think, that the debtor may file his petition in the district in which he has resided or carried on business for the six months next immediately preceding the filing of the petition, or for the longest period during or within such six months that he has resided or carried on business in any district. Any other interpretation would wholly exclude a class of debtors from the operation of the act. Every debtor who has changed his residence and his place of carrying on business so often during the six months as not to have resided or carried on business in any one district for more than three months thereof, would be wholly excluded from the operation of the act. It is not to be presumed that such an effect was intended. The object of the provision is to bring within the operation of the act every debtor who has resided or carried on business in any district for any length of time, provided the

proceedings are instituted in the district in which his residence or carrying on of business has continued so long as to cover the longest space of time that he has resided or carried on business in any district during the six months next immediately preceding the time of filing the petition. The idea manifestly is to select as the forum the district where, by reason of the longest residence or the longest duration of carrying on business, the debtor is likely to be best known or to have had the largest number of business transactions, with the proviso that such residence or carrying on of business need not have continued for a longer period than for the six months next immediately preceding the time of filing the petition. Thus, during or within such six months, the debtor may have resided or carried on business in one district for two months, in another for one month and three quarters, in another for one month and one quarter, and in another for one month. In such case the proper district in which to file the petition is the one in which the debtor has resided for the two months. So, if, as in this case, business has been carried on in one district for two months during such six months, by the debtors as copartners, and has not been carried on by them as copartners in any other district for any other portion of such six months, such district is the proper district in which to file the petition.

The fact that the three copartners carried on business as such in Massachusetts for as long a period during the six months as they carried it on in New York, does not deprive this court of jurisdiction, it not appearing that they carried on business in Massachusetts for a longer period during the six months than they carried it on in New York. Two months is the longest period during or within the six months, that the three copartners carried on business as such in any district, and they so carried it on for that length of time in this district. Their carrying on of business in this district as copartners having continued so long during the six months as to cover the longest space of time that they carried on business as copartners in any district during that period, this court has jurisdiction, notwithstanding they carried on business as copartners in

Massachusetts an equal length of time during the same period.

The jurisdiction of this court is sustained, and Day and Pratt must answer to the merits of the petition on the 9th of October, 1869, at 11 o'clock A. M.

J. M. Ball for the petitioner.

D. S. Riddle for Day.

S. E. Currier for Pratt.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where bankrupt is upon his examination and fails to answer proper questions propounded, he will be compelled to answer by the court.

In re ASA HOLT, JR.

I, ISAAC DAYTON, one of the Registers in bankruptcy of this court, in the absence of Register James F. Dwight, sitting and acting in his absence for him, do hereby certify that pursuant to an order made by me on the 7th day of September, A.D. 1869, Asa Holt, Jr., the bankrupt above named, was examined on oath, September 9th, 1869, before the undersigned, under and as required by the 36th Section of the Bankrupt Act of March, 1869.

And I hereby certify that, in the course of said examination, the questions arose which are stated and set forth in the examination hereto annexed, which questions are hereby, at the request of H. C. Bennett, attorney for examining and contesting creditors herein, certified to the honorable the Judge of the District Court for his decision thereon.

ISAAC DAYTON,
Register.

Examination of Asa Holt, Jr., the bankrupt above named, taken pursuant to an order made in this Bankruptcy Court.

In re Holt.

Q. 1. Mr. Holt, it appears your petition was filed the 19th day of December, 1868?

(Question withdrawn.)

Q. 2. About how much did you claim from Mr. Schell? A. I only claim what Mr. McIntire said it should be, which was ninety-six thousand dollars for three of us, myself, Mr. McIntire, and Mr. Davis.

Q. 3. What was your proportion of it? A. One-third of the amount.

Q. 4. When did that claim arise? A. In 1863, 1864, and 1865; 1864 and 1865, I think.

Q. 5. Why did you not put it among your assets in your schedules? A. Because it had been settled by an irrevocable power of attorney given to Stephen T. Russel.

Q. 6. When? A. In January, 1866.

Q. 7. Did you know that statements had been made at the time you were in consultation with Mr. Rudd? A. Yes. I knew that statements had been made.

Q. 8. You subsequently took a consultation with Mr. Rudd, and had a settlement with Mr. Schell, did you not? A. I did not.

Q. 9. Did Mr. Schell pay you subsequently to this consultation two thousand dollars in cash, and three thousand dollars in acceptances? A. He loaned me that sum of money; he did not pay me at all.

Q. 10. Just previously to the delivery of this five thousand dollars which I have spoken of, did you not execute and deliver to Mr. Schell a release? A. I did.

Q. 11. Was that a general release? A. Yes.

Q. 12. Did not Mr. Schell make the execution of this release the condition on which he would deliver to you this five thousand dollars? A. No, sir.

Q. 13. Did he not refuse to deliver to you that five thousand dollars until you executed and delivered that release? A. There was no amount of money specified at all, nor any consideration.

Q. 14. Question repeated. A. There was no amount of money nor consideration mentioned at all.

Q. 15. Question repeated. A. He refused to answer me or have conversation with me, or business with me till that was settled.

Q. 16. Question repeated. A. I can't answer any differently.

Q. 17. Question repeated.

The Register considers the question has not been answered, and so states to the bankrupt.

Witness gives same answer.

ISAAC DAYTON,
Register.

BLATCHFORD, J.—The witness has not answered question 13. From his answer to question 12, it is apparent that there can be no difficulty in his answering question 13 categorically. He must do so.

UNITED STATES DISTRICT COURT—MAINE.

Whether the bankrupt should be allowed to consult counsel upon his examination, must be determined by the Register, according to the circumstances of each particular case.

In re LORD.

I, CHARLES HAMLIN, one of the Registers of said court in bankruptcy, do hereby certify, that in the course of the proceedings in said matter, before me, the following question arose pertinent to said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Mr. McCrillis, who appeared for the bankrupt, and Mr. Crosby, who appeared for Wood & Bishop, creditors of said bankrupt.

The bankrupt on his examination, conducted by Mr. Crosby, attorney for creditors, was asked by me to answer the following *written* question proposed by Mr. Crosby, viz.: Have you ever made more than one deed to Hinkley & Egery, and if yea, what property and when? The bankrupt answered, that he desired to consult with his counsel, Messrs. Varney & McCrillis, who were present, before answering the question. Being

of opinion that it was within my duty by law to determine whether, from the nature of the question and the facts sought to be discovered, the aid of counsel was necessary, and to aid me in deciding whether to refuse or admit the bankrupt to consult his counsel, I asked the following question of the bankrupt, viz.: Have you any recollection or knowledge of the subject-matter inquired into? and decided he should answer this last question without consulting his counsel; and the bankrupt answered, that he desired to consult with his counsel upon this question. I thereupon decided, the bankrupt should answer both of above questions without consulting with his counsel.

And the said parties requested that the same should be certified to the judge for his opinion.

CHARLES HAMLIN,
Register.

FOX, J.—Whether the bankrupt should be allowed to consult upon his examination, must be determined by the Register according to the circumstances of each particular case. Counsel should not frame the answers; and as a general rule, I do not approve of the bankrupt's consulting with his counsel on his examination.

In the present case the Register was right in his decision.

UNITED STATES DISTRICT COURT—MAINE.

When the Registers have no power to order bankrupts to execute deeds.

In re A. B.

UPON the examination of said bankrupt in behalf of said creditors, the assignee being present, the following question was proposed to said bankrupt, viz.: "Referring to the conveyances requested by the assignee, please state whether you are now willing to execute them." The bankrupt answered: "Upon consulting with my counsel, present, I decline signing the deeds, unless otherwise directed by the court."

The deeds referred to are release deeds of an interest of the bankrupt, which he had at the time of filing his petition in bankruptcy in Penobscot county, in this district.

The counsel of said creditors and assignee then moved before me, that I order the bankrupt to execute said deeds.

Mr. Crosby, for creditors, and Judge Humphrey, assignee, spoke to the point that the execution of the deeds by the bankrupt would enable the assignee to sell the property at better terms, he thereby having the title to the same as it appeared of record.

McCrillis & Varney, for bankrupt, spoke to the point that all of the bankrupt's title to the property was now vested absolutely in the assignee, by the assignment under Section 14, and that the "instruments, deeds, and writings" named in General Clause 59 (Rice's Manual), Section 14, of Bankrupt Act, contemplate real property situate beyond the jurisdiction of the court, or beyond the limits of the United States.

OPINION BY REGISTER.

I decided that I had no power to make the order requested, being of the opinion that the application should be made to the judge of this court. I did not pass upon the question of the right of the assignee as to whether or not, under Sections 14, 15, and 26, the bankrupt ought or not to execute the conveyances.

And the said parties requested that the same should be certified to the judge, for his opinion thereon.

CHARLES HAMLIN,
Register.

Fox, J.—Decision approved.

UNITED STATES DISTRICT COURT—MAINE.

When an attorney is not privileged from answering, being called as a witness.

In re JOHN O'DONOHOE.

AT Bangor, March 4th, 1869, before Charles Hamlin, Esq., Register in bankruptcy.

In re O'Donohoe.

Edmund W. Flagg, of said Bangor, being first duly sworn, and examined at the time and place above mentioned, upon his oath, says, in answer to the questions proposed by H. M. Plaisted, Esq., assignee:

Q. 1. Did you have charge or direction of the sale, at auction, of the John O'Donohoe stock of goods, in No. 2 Harlow's Block, Dec. 7th and 9th, 1868?

Interrogatory objected to by deponent, who assigns the following reasons therefor: I am a lawyer and member of the Penobscot Bar, and admitted to practice in all the courts of the State. I am a stranger to any of the facts inquired of in the interrogatory, and to all and any facts in the cause, except so far as they have been communicated to me by my clients as their professional adviser, and all that has been done by me has been done from information derived from them, and by their direction.

I do not consider myself at liberty, and do not believe the law requires counsel to divulge in a court of justice what has been communicated to him by his clients, or what he did while acting in their behalf. My clients are Dennis J. Mullen, and Timothy Sullivan.

Q. 2. Did you receive the proceeds of the sale of said stock? Interrogatory objected to by deponent as above, and for same reasons.

Q. 3. What was the amount of the sale of said stock of goods? Interrogatory objected to by deponent as above, and for same reasons.

Q. 4. Did you have in your possession or control the proceeds of said sale, at the time you were served with an injunction from the United States District Court for the district of Maine, restraining you from paying over the same to your clients or other parties? Interrogatory objected to by deponent as above, and for same reasons.

Q. 5. Have you in your possession or control the proceeds of the sale of said stock of goods? Interrogatory objected to by deponent as above, and for same reasons.

Q. 6. Have you ever received, or had in your possession or

control, the proceeds of said sale? Interrogatory objected to by deponent as above, and for same reasons.

Q. 7. Were you, on or about the 12th of December, 1868, served with an injunction from the United States District Court, for the district of Maine, issued on petition of creditors of John O'Donohue, a bankrupt, restraining you from paying over the proceeds of said sale of goods to your clients or other persons? Interrogatory objected to by deponent as above, and for same reasons. A. I was.

On motion of assignee referred to the court, as provided by the Act of Congress, approved March 2, 1867, Section 7th.

OPINION OF REGISTER HAMLIN.

Were the objections of Mr. Flagg, the witness, against the questions propounded by the assignee, valid, or should they be overruled, and the witness required to answer? This depends upon whether the subject-matter inquired into was a field of legitimate inquiry, and the extent of the privilege allowed by law, which forbids counsel from being compelled to disclose the secrets of his clients.

There can be no doubt of the reason for the inquiries of the assignee who proposed the questions. He claims that he can show the witness did have charge of the auction sales, and expects to prove that the proceeds of the sale went into his hands. The inquiry being pertinent, how far is the witness protected from answering, because of his peculiar relations to Mullen & Sullivan, they being clients.

The bankrupt has disclosed on his examination facts tending to show, that when he executed mortgages to those persons and others, he was insolvent, the mortgages being executed September 7th, 1868; that November 7th and 9th, 1868, the stock of goods covered by the mortgages was sold at public auction, the bankrupt having previously executed to Mullen a bill of sale of all his interest as mortgagor, and that Mr. Flagg, the witness, made the writings or mortgages. The question was discussed before me, and some authorities adduced. The assignee relied mainly on Section 24th, Greenl. Evidence, Vol.

I., on the ground that the deponent is a *party* to the transaction, *i. e.*, the sale of the property and the disposition of the proceeds.

The law which protects parties in such matters is clearly stated by Greenleaf in chap. 13, Vol. I., on Evidence.

He says, "The rule is clear and well settled, that the confidential counselor, solicitor, or attorney of the party, cannot be compelled to disclose papers delivered, or communications made to him, or letters or entries made by him in that capacity." If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account and for his benefit, in the transaction of his business, or, which amounts to the same thing, if they commit to paper in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information, or produce the papers, in any court of law or equity, either as a party or as a witness.

And the reason and foundation of the rule is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. Says Chief Justice Shaw: The law has considered it the wisest policy to encourage and sustain this confidence, by requiring, that on such facts the mouth of the attorney shall be for ever sealed. See remarks of Metcalf, J., in *Barnes* v. *Harris*, 7 Cush., 576; and the same jurist observes, in *Hatton* v. *Robinson*, 14 Pick., 422, "but the privilege of exemption from testifying to facts actually known to the witness, is in contravention to the general rules of law; it is therefore to be watched with some strictness, and it is not to be extended beyond the limits of that principle of policy upon which it is allowed."

Such is not only the well-settled rule of law, but the reason

and philosophy on which it is founded. How does this cause stand when referred to the rule? Certainly the *acts* of counsel who took charge of an auction sale, and handled the money arising from such sales, cannot be called privileged communications. They are not matters which come within the ordinary scope of professional employment. The interests of justice demand, and the administration of justice, especially in a bankrupt court, require, that the fullest examination of the *acts* of counsel be allowed in such a cause as this.

The privilege in question is confined to communications, and does not apply to the acts of parties. *Kelsey* v. *Jackson*, cited in 4th Am. ed., p. 113, Adams' Equity.

Respectfully submitted,

CHARLES HAMLIN, *Register.*

Fox, J.—It is a mistake to suppose that an attorney is privileged from answering as to everything which comes to his knowledge while he is acting as attorney. The privilege only extends to information derived from his client as such.

Information derived from other persons or sources, although derived or obtained while acting as attorney, is not privileged, 7 East, 357; the principle of the rule does not apply to the discovery of facts within the knowledge of an attorney, which were not communicated or confided to him by his client, although he became acquainted with the facts while engaged in his professional duty as the attorney of the client. In 1 Hill, 33, it was decided that if an attorney was present at any transaction in the way of business between his client and a third person, he is not privileged as to what then took place. In 30 N. Y. R., 330, *Whiting* v. *Barney*, the marginal note is, "the rule which protects professional communications of clients to their attorneys from disclosure, should only be held to extend to such communications as have relation to some suit, or other judicial proceeding either existing or anticipated." This is somewhat in conflict with other authorities, but it seems to me to be well sustained by the principles upon which the rule is supposed to rest; in this case Ingraham J., says, in his

opinion, " The decisions settle the rule, that when the disclosures are made in the presence of a third party, they are not privileged."

The answers to the questions propounded to Mr. Flagg in the present case could not possibly have disclosed any privileged communication; they only called upon him to state his own proceedings in the disposition of a stock of goods and the amount he received therefor. It was solely his own acts which he was required to disclose, and not anything whatever which his clients ever communicated to him; these acts were not professional; did not appertain to the duty of an attorney, but were such as any agent could have done, being the ordinary proceedings of an agent in selling the property of his principal, and paying over the proceeds which were the subject of investigation and inquiry. Whatever this witness had done in this behalf was not in his capacity of an attorney or counsel, but was in the character of an ordinary agent of a third party, transacted openly, with the knowledge of many other persons, and with nothing secret or confidential in any respect, so far as appears.

In 15 La. Ann. R., 331, the same course of inquiry was made to a witness, and he was required to answer who was his client, when that relationship commenced and terminated, what money he had received and paid over, and to whom paid.

The law required of Mr. Flagg an answer to each of the questions propounded to him on this examination, and I have no doubt that he will at once make the requisites replies on learning the opinion of the court.

UNITED STATES DISTRICT COURT—S. D. GEORGIA.

The bankrupt is entitled to the exemption of a homestead out of land mortgaged by him, to secure the payment of borrowed money, prior to the time of claiming such homestead.

In re James B. Brown.

I, Frank S. Hesseltine, a Register of said court in bank-

ruptcy, do hereby certify that in the course of the proceedings in said cause the following question pertinent to said proceedings arose and was stated, and agreed to by Arthur Hood, Esq., counsel for the bankrupt, and T. K. Appling, Esq., who appeared for Hamilton Perry, administrator of the estate of Elam Lee, a creditor of the said bankrupt.

On the 13th day of January, 1860, James B. Brown executed a mortgage upon a lot of land with hotel and stable in Blakely, Georgia, to Elam D. Lee, executor of Elam Lee, to secure the payment of money loaned.

On the 5th day of May, 1868, the said Brown filed his petition to be declared a bankrupt. The said land is the only real estate returned by said bankrupt, and is worth more than five hundred dollars. He claims an allowance of five hundred dollars for a homestead out of the proceeds of the sale of the said property, which claim is resisted by the said creditor. And the said parties requested that the issue thus raised should be certified to your Honor for your opinion thereon.

OPINION OF THE REGISTER.

The question here submitted is, "Is the bankrupt entitled to homestead out of property mortgaged by him to secure the payment of borrowed money, prior to the time of claiming such homestead.

In re John B. Whitehead your Honor affirmed my opinion that the bankrupt is not entitled to the exemption of homestead out of land mortgaged by him at the time of its purchase, to secure the payment of the purchase-money, until the said mortgage is satisfied. See 2 N. B. R., 588. In the course of the opinion I stated "that the debtor who seeks to have a homestead set apart for himself and family, must first have a full and complete ownership and title to the property; it must be entirely his property, *unsaddled with any encumbrance, lien or condition* affecting his title thereto." * * * "The code does not deny the head of a family the right to create a lien on property not previously exempted in accordance with the provisions of the Homestead Act. *He is free to do what he will with his own, convey or mortgage it.*"

After renewed consideration of the law relating to the exemption of property, I do not desire to vary that language, and re-utter it here as a reason why I think that James B. Brown, the bankrupt, is not entitled to a homestead out of land upon which, by his mortgage, he has already created an "encumbrance, lien, or condition affecting his title thereto."

The Code of Georgia, after designating the property to be exempted to a debtor who is the head of a family, goes on to state the course to be pursued by "every debtor seeking the benefit of the act." A claim for exemption of the property is to be made and recorded in the clerk's office, the land must be laid off, and a plat of the same likewise recorded.

Further on, Section 2019 of the Code declares that "Any officer knowingly levying on or selling any property of a debtor exempt under this law, *a schedule of which has been returned as required*, is guilty of trespass," etc., and Section 2020, "The debtor shall have no power to alienate or encumber the property exempt under this law, but the same may be sold by the debtor and his wife, if any, jointly, with the consent of the court of the county," etc. By this it is provided that an officer shall not levy on and the debtor shall have no power to alienate or encumber the property which has been duly exempted, *i. e.*, set apart and recorded in court in accordance with the provisions of the law.

The power to alienate or *encumber* the property which has not been duly exempted is not taken away from the debtor. It is a natural subsisting right. He can deal with his own property as it pleases him; and the lien of a mortgage given by him for a good consideration is unquestionably valid and binds the property. It is a *contract*, his *obligation* to keep which may not be *impaired* by any subsequent act of his or by any law. Since, then, the law nowhere denies the head of a family the right to sell or encumber property which has not been set apart in accordance with the Homestead Act—and this natural right is his until taken away by statute—he surely will not be permitted, having borrowed money on the strength of a mortgage legally given to the creditor to secure the payment of

the same, thereafter to invalidate his mortgage by putting in a claim to have the lien of it discharged, and the property set apart to him for a homestead. This, as I view it, would be a wrong that neither a court of law or equity will uphold or sanction.

The mortgage contract solemnly entered into by permission of law must receive the approval and aid of the law.

Respectfully submitted,

FRANK S. HESSELTINE,
Register in Bankruptcy.

ERSKINE, J.—Mr. Register Hesseltine, in his written opinion, on the question which arose before him in the course of the proceedings in the matter of James B. Brown, a bankrupt, relied on the case of John B. Whitehead, as being analogous in principle, if not wholly governing the case of Brown.

In the case of Whitehead, the point for decision was whether the bankrupt was entitled to the exemption claimed out of the land mortgaged by him to the vendor, at the time of the purchase, to secure the purchase-money.

There the equitable lien of the vendor was involved; and notwithstanding the vendee gave a mortgage on the land to the vendor—executed simultaneously with the purchase—I was of the opinion, on principle and authority—and in entire consonance with the conclusion expressed by Mr. Hesseltine—that the vendor, by taking the mortgage on the land alone, did not waive his lien; and affirmed the decision of the Register, denying the exemption out of the land—land he never paid for, and for which he was merely the trustee for the vendor; *In re* John B. Whitehead, 2 N. B. R., 599; *In re* Lindsey Perdue, *Id.*, 183; 2 Story, Eq. Jur., Sections 1227, 1228; 4 Kent, 151; 9 Ga., 86; 14 *Id.*, 216; 5 Ind. R., 492.

Brown's case is briefly this: He was the owner of a hotel and stable lot in Blakely; these, in January, 1860, he mortgaged to E. D. Lee, executor of Elam Lee, for money loaned him by the executor. In May, 1868, Brown filed his petition in bankruptcy, including in his schedule the mortgaged prop-

erty, it being all the real estate he owned. He now claims to be allowed out of the proceeds of the sale of this property, when sold, it not being (as was agreed by counsel on both sides) susceptible of partition, five hundred dollars in lieu of a homestead. The bankrupt is the head of a family, and has three minor children.

I need scarcely remark, that in Georgia, a mortgage is a security for the debt—and nothing more; the title to, and ownership of the property remaining in the mortgagor, until foreclosure and sale.

From what I have said, I think it will be readily observed that there is a clear and very marked difference between the case of Whitehead and this of Brown.

Turning to Cobb's Dig., 390, it will be seen that, by the act of 1843, which is amendatory of the act of 1841, *Id.*, 389, fifty acres of land are exempt from levy and sale, "except the same shall be for the purchase-money of said land, for the payment of which the land shall be bound."

The act of 1845, *Id.*, 391, extends the humane and equitable benefits of the preceding acts to citizens of any city, town, or village in the State, "to include real property in such places not exceeding in value two hundred dollars."

Thus stood the law when the executor of Lee received from Brown the mortgage on the hotel and stable lots. And can the executor of Lee now complain of Brown, and did he not lend the money and accept the mortgage under the law exempting a certain portion of the property of the debtor from levy and sale?

By the provisions of the act last cited—the property being situated in a town—Brown would have been entitled to an exemption of two hundred dollars only. But he now claims to be allowed five hundred dollars out of the sale of the mortgaged premises, under the Act of Congress of March 2, 1867. Section 14 of this act, in enumerating what shall be excepted from the operations of its provisions, in the last clause of the first *proviso*, says: "And such other property not included in the foregoing exceptions as is exempted from levy and sale,

upon execution or other process or order of any court, by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year eighteen hundred and sixty-four."

In Section 3, Pt. 2, Tit. 3, Chap. 2, Art. 4 of the Code (1st ed.), will be found the exemption laws in force in Georgia in 1864. Section 2013 states what property shall be exempt from levy and sale by virtue of any process whatever under the laws of this State. And Section 2017 declares that "If the debtor owns town property exceeding in value five hundred dollars, and it cannot be divided so as to give his family that amount, he may give notice to the officer levying thereon, and when the proceeds of the sale are to be distributed, the court shall order five hundred dollars of the same to be invested by some proper person in a home for the family of the debtor, which shall be exempt as if laid off under this law."

As already observed, when the mortgagee took the mortgage to secure the payment of the money loaned, the exemption laws then of force were an ingredient in the contract. But whether, after the code went into effect, and the mortgagee had then foreclosed, and a sale had taken place, the mortgagor could claim, under the new exemption laws of Georgia, five hundred dollars, is a question not necessary to discuss here. It is sufficient, for the purposes of this case, that the National Legislature has, in pursuance of the 8th Section of the 1st Article of the Constitution, enacted a statute to establish uniform laws on the subject of bankruptcies throughout the United States. *Sturgis* v. *Crowninshield*, 4 Wheat., 122, 196, 199. And if any of the State exemption laws are in conflict with acts of Congress they must yield; otherwise the National government could not move on, and its Constitution and laws could not be paramount, even within their proper sphere. *Martin* v. *Hunter*, 1 Wheat., 304. *Gibbons* v. *Ogden*, 9 Wheat., 1, 195, 209. *Commonwealth* v. *Kimball*, 24 Pick., 359. *United States* v. *Hart*, Peters, 6, C. R., 390. *Homes* v. *Jennison*, 14 Peters, 540, 574. Indeed, this is made necessary by the Constitution itself.

"This Constitution and the laws of the United States made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."—Art. VI.

The decision of the Register is reversed.

The clerk will please certify this opinion to Mr. Register Hesseltine.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

An opposing creditor to discharge of bankrupt in Illinois, charged substantially that he had covered up property in his wife's name.

Held, Under the State statute a married woman is entitled to all she obtains from a source independent of her husband, but a man in embarrassed circumstances and insolvent, cannot make use of his wife, directly or indirectly, to cover up from his creditors any of his property, or any of his earnings or his skill.

In re ELISHA ELDRED.

IN this case a question came up, the decision of which involved a construction of the statute of Illinois, passed in 1861, sometimes called the Married Woman's Act. The specifications were, in substance, that the bankrupt had covered up property which should go to his creditors, by placing it in the name of his wife. The opposing creditor was the bankrupt's brother, Anson Eldred, of Milwaukee, and he was scheduled as a creditor to a very large amount. The property was a bark, "The Two Fannies," and a house and lot on Michigan avenue. It appears in testimony, that a son of the bankrupt and the wife (Mrs. Eldred), had at one time furnished to her as a gift the sum of five thousand dollars, by the purchase of a house in Detroit; he had as well some years before received a loan of a like sum from his father, to enable him to go into business.

Judge DRUMMOND in delivering the opinion of the court in substance said: The only property or money, so far as we know, which Mrs. Eldred obtained, independent of her husband, by

which this property was purchased, was what was obtained from her son; he also, however, indorsed the notes that were given for the vessel.

One of the embarrassments of the case arises out of the relation in which the party who made these advances, or gave this assistance, stands to the person who, it is claimed, made the purchase, and to the bankrupt, he being the son of both the parties. If the money had come from a party not connected with the others, the difficulty of such a case would be less. It is, therefore, proper to consider what had appeared in evidence, to wit: the advance made by the father to the son at a time when it was claimed he was insolvent, and could not, in honor, make such an advance. If there was a free gift, having no sort of connection with what the father had done for him, then the mother would be entitled to the full benefit growing out of such a circumstance, but otherwise not, as then the father's pecuniary relation would have entered into the transaction. For while the statute gives to a married woman the right, independent of her husband, to control and manage her own property, not coming from her husband, it is clear that it never contemplated that a married woman should be made use of as an instrument by which the pecuniary interest of the husband should be protected as against his creditors. So that while it is just and right that whatever the wife acquires during coverture from an independent source, should be kept for her protection and support, it is also just that that which comes indirectly from her husband should not be sequestered and excluded from his creditors. In this case whatever went into the property as a gift, pure and simple, with which the money of the father had nothing to do, in that the wife should be protected.

When a man is in embarrassed circumstances, and insolvent, he cannot make use of his wife, directly or indirectly, to cover up any of his property, or any of his earnings, or his skill. So far as she gets property of her own, independent of him, she is to be protected; but he cannot make use of her as an instrument to gather about her his means, skill, or labor, or any-

thing that is connected with him. Thus, a man has no right to go to his wife and say, This is a good bargain; make this purchase; give your notes for this property, that property, or the other; and make the purchase, and then escape the responsibility of transaction, so far as he is a debtor, if there is nothing proceeds from his wife as a consideration of the purchase. That is his transaction, the result of his skill and judgment, and his creditors are entitled to it, and he cannot in that way cover up the interest which he may have in that property, which is the fruit of his skill and his judgment, from his creditors. If, on the other hand, there is a consideration proceeding from the wife, belonging to her, money or property with which he is unconnected, then she should be protected in the property.

The bankrupt was found not guilty under the specifications. The matter stands on a new trial, made by *Rae & Mitchell*, for the opposing creditor.

UNITED STATES DISTRICT COURT—E. D. PENNSYLVANIA.

An assignment for the benefit of creditors, without any preference, sixteen days before the filing of the debtor's petition in bankruptcy, and when a creditor proceeding adversely was about to obtain a judgment, *Held*, not to preclude the discharge of the bankrupt.

That such an assignment would be an act of bankruptcy under the 39th Section of the Bankrupt Law, if adversary proceedings were instituted within six months, does not make it, in the absence of actual fraud, a bar to a discharge, under the 29th Section.

Such an assignment, though voidable by the assignee in bankruptcy, is not void.

In re PIERCE & HOLBROOK.

THE petition in this case was filed on December 31, 1869. The bankrupts having applied for their discharge, on the day appointed to show cause, October 8, 1869:

CADWALADER, J., said:—Should the discharge of these gentlemen be unopposed, it will, nevertheless, be my duty, under the 32d Section of the Act of Congress, to consider whether their execution of a general assignment for the benefit of their creditors, without any preference, sixteen days before their

original petition in bankruptcy was filed, and when a creditor was about to obtain a judgment against them, constituted such a breach of their duty under the act, as to preclude their discharge. According to a decision in Goldschmidt's case in the Southern District of New York (3 B. R., 41), the discharge could not be granted, even though the assignment had been made more than six months before the commencement of proceedings in bankruptcy; and, if I were to follow that decision, the present case of an assignment of this kind, made within that period, would be more unfavorable to those bankrupts. The decision is, however, contrary to the views upon which I have acted in many former cases, and to views which I still entertain. I have in several cases adjudged such an assignment an act of bankruptcy under the 39th Section of the act, if adversary proceedings under that section were instituted within the period of six months therein limited. But, even in such a case, I have not, in absence of actual fraud, considered the execution of such an assignment a bar to a discharge. Even where the assignment has been the sole foundation of the proceedings in bankruptcy, I have considered it not a *void* act, but an act *voidable* by the assignee in bankruptcy, under a bill in equity, filed for the purpose of avoiding it; and have sustained acts done under it previously in good faith. In one case I refused an injunction under such a bill, because the injunction would have prevented the working out of an equity beneficial to the creditors. In another case, I suspended granting an injunction and appointing a receiver until the completion of a beneficial sale by the assignee under a previous deed. In a third case, of a very suspicious kind, where a sale had apparently been forced by the assignee under the previous deed, at a sacrifice, and the bill was at the suit of the petitioning creditor, before the appointment of an assignee in bankruptcy, as the previous assignee was of unquestioned solvency, and might be liable for the full value of what had been sacrificed, I made a qualified and guarded order for a receiver and injunction, in such a form as would not interfere with the recourse of the future assignee.

I am ready to hear an argument of any counsel who may desire the subject reviewed; but for the present am unable to follow the New York decision.

The forms prescribed by the judges of the Supreme Court contain a provision, that "if all or any of the debtor's property has been conveyed by word, or deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same." This must be set forth as far as possible under one of the heads of Schedule B, annexed to the original petition. In the present case, the deed was too recently executed for the fulfillment of all those conditions in the original petition. But when the bankrupts came to pass their last examination, the deficiencies ought to have been supplied. This, if they believed the trustee under the previous assignment to have executed his duty faithfully, might have required only the exhibition of a copy of the inventory and account.

But the duty of the bankrupts, and of the assignee in bankruptcy, did not begin or stop here. It is altogether unaccountable that the assignee in bankruptcy has made no report as to how he has settled, or why he has not settled, accounts with the previous voluntary assignee. If the whole estate went into the hands of the assignee in bankruptcy, as may be inferred from his inventory, he ought to have so reported; and he should now so report.

In the early part of the present century, when all English bankruptcies were still, in form, compulsory, a frequent, if not the most frequent, act of bankruptcy in England, was the execution by the debtor of a deed of composition. If all the creditors came in under it he was released, and they took his whole estate. If they did not, one of them petitioned in the adversary form, and the debtor was adjudged a bankrupt for having executed the deed. But in the absence of actual fraud, no debtor was ever precluded from a discharge by having made such an assignment. This continued until the year 1825. It

had become an ordinary substitute for the former usual act of bankruptcy by denial to a creditor. Of course, if the assignee under the composition deed had received any part of the estate, it was accounted for to the assignee in bankruptcy.

In the present case, I think it may be reasonable to suspend granting a discharge, until the assignee in bankruptcy shall have filed and settled his account. It was part of the bankrupt's duty to his creditors, to see that the assignee's account was exhibited in proper season; and, in this case, there appears to have been either a large amount of assets, or a great necessity for a full report and explanation.

But if there is any reason against such delay counsel will be heard.

The voluntary assignment contains a provision to except from its operation "the separate property" of the wife of one of the bankrupts. If there was any property as to which such a statement was at all necessary, there should be a statement and explanation. They should, therefore, be furnished.

UNITED STATES DISTRICT COURT—TEXAS.

Lawyers were employed by bankrupt to prepare petition and schedules, soon to be filed in voluntary bankruptcy, and by agreement bankrupt gave them his note of hand for the amount due, secured by mortgage of his real and personal property, set forth in the schedules as assets.

Held, the mortgage was made contrary to provisions of the 35th Section of the act, is a nullity, but they can prove their claim as unsecured creditors.

Bankrupt can no more execute a conveyance declared by the law to be null and void, in order to secure a fee to his lawyer, than to secure the claims of any other creditor.

Provisions of Section 39 relate exclusively to proceedings in involuntary bankruptcy.

In re Thos. C. Evans.

Duval, J.—The question certified to me for decision in this case, arises upon a difference of opinion between a creditor and the assignee of the bankrupt.

From an agreed statement of facts between the creditors' at-

torney and the assignee, it appears that on the 24th December, 1868, the bankrupt being on the eve of going into bankruptcy, and having but a few days in which to prepare his petition and schedule, and file the same in the court at Austin, prior to the 1st January, 1869, employed Messrs. Strickland & Evans, attorneys at law, to perform the service, and agreed to pay them five hundred dollars, for which amount he executed his note, and, to secure the payment of the same, gave a mortgage on nearly all the property, real and personal, named in his schedules.

Under this state of facts, and in view of the law applicable to them, the assignee, J. H. Hutchins, Esq., regarding the mortgage as a nullity, refused to consider the claim as a secured one, but approved and registered the same as an unsecured debt against the estate of the bankrupt. A short time subsequently, he amended his action in the premises, and rejected the claim *in toto*.

While it is apparent that no actual fraud was intended in this transaction by either the bankrupt or his attorneys, there can be no doubt, I think, that the mortgage in question was made contrary to the provisions of the 35th Section of the Bankrupt Act, relating to sales, transfers, assignments, etc., made by a bankrupt four and six months before the filing of the petition by him. The mortgage was, therefore, technically a fraud upon the act, as being in contravention of those provisions, and I think the assignee did right in holding it to be a nullity. A bankrupt can no more execute a conveyance, declared by this law to be null and void, in order to secure a fee to his lawyer, than to secure the claim of any other creditor. The claim of a lawyer for professional services rendered the bankrupt, no matter how meritorious or necessary such services may have been, is not a preferred one. It stands like a claim of any other creditor, and cannot be secured by a conveyance which the law denounces as a nullity.

I think, however, the assignee has gone too far in rejecting the claim entirely. He seems to have been influenced to this course by the last clause of Section 39. This clause prohibits

a creditor, under certain circumstances, from proving his debt in bankruptcy, and I suppose the assignee regarded those circumstances as existing in the present case. But this whole section has reference solely to proceedings in involuntary bankruptcy, and its provisions are applicable only to persons adjudged bankrupt on the petition of one or more of their creditors. I do not think that the prohibition contained in this section against certain creditors proving their debts can be justly applied to the creditors in this case.

Upon the whole, my opinion is that the claim of the creditors, Strickland & Evans, should be allowed by the assignee as an unsecured debt, and that the same is entitled to be paid out of the assets of the bankrupt as any other debt of that character.

UNITED STATES DISTRICT COURT.—MARYLAND.

Petition filed in involuntary bankruptcy, was signed in the firm name of creditors, and affidavit made thereto by one C., a member of the firm, averring that the defendant, "being a trader, had fraudulently suspended and not resumed payment of his commercial paper within a period of fourteen days."

On demurrer, *Held*, objection to the sufficiency of averment cannot strictly be raised on demurrer, but should be by answer.

The intent of the alleged bankrupt in suspending payment should be alleged as a fact.—Leave granted to answer.

In re JOHN M. OREM & Co. *v.* GEORGE W. T. HARLEY.

ON the 12th of July, 1869, John M. Orem, Son & Co., creditors, filed their petition, praying that the defendant, Harley, might be declared bankrupt. The petition proceeded upon two alleged acts of bankruptcy. It embraced the usual formal allegations, and set forth in full the character of the petitioners' claim, which consisted of two promissory notes, one of which matured on the 13th of April, and the other on the 6th of June. The petition then went on to charge the specific acts of bankruptcy as follows:

First. That within the preceding six months, the said Harley

did commit an act of bankruptcy, "in that the said Harley, within the period aforesaid, and within the said district, to wit: on the 13th day of April, A. D. 1869, being a trader, has fraudulently suspended, and has not resumed payment of his commercial paper within the period of fourteen days." A similar act, charged to have been committed on the 6th of June, was alleged in the same language.

Second. That within the same period, to wit: on the 2d of April, 1869, being possessed of certain real estate (which is fully described in the petition), the said Harley did make a conveyance of the same to Otho F. Harley, of etc., etc. "And that this deponent is informed and believes that the said deed was made with intent to defraud the creditors of George W. T. Harley."

The petition was signed "John M. Orem, Son & Co.," and the affidavit thereto was made by Chase, one of the partners.

To this petition the defendant's counsel filed a demurrer, which was argued on the 25th September. The grounds of the demurrer, in regard to the first allegation, were, That the alleged act of bankruptcy was insufficiently set forth—that the general language of the act, as used in the petition, was not sufficient, but that it was necessary to describe, in the allegation, the particular paper, in the payment of which, it was alleged, that the defendant had made default, as well as the circumstances of suspension, so that the court might judge whether or not the papers were commercial papers, and also whether the circumstance of suspension, if proved, as alleged, would amount to a fraudulent stoppage or not; and that the defendant might be informed of the particular paper, in regard to which the suspension was charged, so that he might the better be able in his answer to deny or explain.

In regard to the second allegation, the grounds of demurrer were, first, that the intent should have been alleged as a fact, and not stated simply as a matter of information and belief; and, secondly, that even if sufficiently charged, it was not the charge of the "petitioners," but only of "this deponent," and that "this deponent" (Chase), in his individual capacity, was neither

a creditor nor a party to the petition, and, therefore, had no standing in court.

The demurrer was sustained as to the second allegation, and overruled as to the first, on the ground that a demurrer was not strictly the proper mode of presenting the question; but, without any expression of opinion upon the points submitted, leave was granted to the defendant, until October 9, to answer the first allegation, or take such other proceedings as seemed fit, whereupon his counsel filed a motion to discharge the rule requiring him to show cause in respect to the said first allegation.

This motion was submitted upon the argument already made on the demurrer, and upon it the court reserves its decision.

Wm. Schley and *Patrick McLaughlin*, for petitioners.

John Ritchie and *Albert Ritchie*, for defendant.

UNITED STATES DISTRICT COURT—MARYLAND.

Bankrupts before proceedings in bankruptcy rented storehouse under written lease; assignees retained possession with bankrupts' goods therein, but finally surrendered the premises to the lessor.

***Held*, the lessor had a preferred claim for the rent. He had a lien which he could have enforced by distress at the term of commencement of proceedings in bankruptcy, and upon the facts stated had not waived it.**

In re Rose, Lyon & Co.

Noah Walker *v.* Randolph Barton, *Assignee, etc.*

By agreement of counsel, the following statement was submitted as setting forth the grounds of the claim of the plaintiff against Randolph Barton, assignee in bankruptcy of Rose, Lyon & Co.:

Rose, Lyon & Co., on the 5th day of September, 1868, petitioned for the benefit of the Bankrupt Act, and Randolph Barton was in the course of proceedings appointed assignee. The bankrupts, before their application in bankruptcy, rented

a storehouse from Noah Walker, under a written lease. The following sums, with interest thereon to be calculated, were due as rent on the said lease at the several dates specified:

May 1, 1868, one quarter's rent due	$525 00
August 1, 1868, " " "	525 00
November 1, 1868, " " "	525 00
November 23, 1868, rent due to date of surrender	140 00

On the 23d day of November, Randolph Barton, assignee, etc., surrendered the said storehouse to the lessor. The lessor, as each quarter's rent became due, demanded the same, and forbore to distrain, upon the request of the lessees, and with the understanding that the goods of the lessees should be kept upon the premises, so as at all times to be liable to distress. At the time the lessees filed their application in bankruptcy, they were advised that the landlord's claim would be a preferred claim, and that thus their promise would be virtually kept.

GILES, J.—On the statement of the question in reference to the claim made by Noah Walker for rent, I am of the opinion that the said claim of the lessor is a preferred claim. For the rent due at the time of the filing of the petition of Rose, Lyon & Co. to be declared bankrupts, Noah Walker had a lien which he could have enforced by distress, and under the facts stated in the argument there was no waiver of the same.

As to that part of the rent which is for the occupation of the store, after the date of the filing of Rose, Lyon & Co.'s petition, that is to be paid as a part of the expenses of the custody, etc., of the bankrupts' estate, and comes within the first-class classification of claims entitled to the priority, by the provisions of the 28th Section of the Bankrupt Act.

I should suppose the first part of the rent would come under the provisions of the act in reference to the liquidation of liens, etc., as provided for by the 14th and 20th Sections of the Act.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

Creditors objecting to discharge of bankrupt must prove their allegations. The mutilation of a book of accounts by bankrupt may be explained.

In re NOOMAN & CONNOLLY.

LOWELL, J.—The specifications in opposition to the discharge of these bankrupt partners, involve only questions of fact. The allegations are that they have concealed a part of their assets, and have concealed and mutilated one of their books of account. The burden of proof is on the objecting creditors, and I am not satisfied that they have sustained it. The books appear to show a profit in the business, and if it was profitable and the stock is worth its cost, the assets ought to be much larger than they are; but it may be that the goods depreciated during the eight months between the last account of stock and the bankruptcy; the bankrupts swear that they did depreciate, and there is no evidence to the contrary. It was argued, with a good deal of plausibility, that very few persons could be made out to be bankrupts by the mere inspection of the books.

The evidence shows a mutilation of one of the books, but it seems that all the outstanding accounts which it contained were transferred to another book, and there is no evidence that any fraud was done to the creditors by the change, but on the contrary there is proof tending to show that the accounts were all collected as far as collectible. There was evidence that the bankrupts, whose business was to manufacture clothing for sale, ready made, changed their mode of doing business not long before the bankruptcy, by taking their cloth on consignment, as they called it, which I understand to be that they agreed with the wholesale houses that the property in the goods should not pass until they were paid for. They would have then an equitable title in the goods to the extent of the payments, and this title they should have disclosed to their assignee, and if it were shown that they had willfully failed to do this it might bar their discharge. But I do not understand that any such allegation is made or proved. It was said at the

hearing, and there is nothing in the case to refute the assertion, that although these goods do not appear on the schedules, yet that the assignee was informed of the facts concerning them, and made such disposition as was proper of the bankrupts' interest in this part of their property. Discharge granted.

J. G. Abbott and *B. Dean*, for creditors.

J. D. Ball, for bankrupts.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

Answer need not be verified. If debtor, in cases of involuntary bankruptcy, do not appear on return-day of rule, he cannot demand a trial of issues by a jury.

In re GEBHARDT.

A RULE was issued directing the defendant to show cause on the 31st of August why he should not be adjudged bankrupt. An answer to the rule was lodged with the clerk by the attorney on the 18th of September, after the expiration of the rule. The answer was not verified. The petitioning creditors applied to have judgment by default, and the defendant applied for leave to file answer.

Per Curiam.—The defendant not having filed his answer on the return-day of the rule, cannot demand that the issues shall be tried by a jury. But, under the circumstances, leave will be given to file an answer, the issues to be tried by the court. The statute does not require the answer to the rule to be verified by affiant.

UNITED STATES DISTRICT COURT.—S. D. NEW YORK.

Petition of creditor in involuntary bankruptcy was dismissed, and he was taxed with costs by the Register, from which he appealed.

***Held*, the several items complained of were properly allowed, except item of ten hundred and seven dollars and fifty cents, allowed marshal for keeper's fees, which is suspended for further evidence of actual payment.**

Affidavit of marshal, in such case, that the expenses were necessarily incurred by him and are just and reasonable, is insufficient. He must state, in addition, that they were actually incurred and paid.

In re SAMUEL LOWENSTEIN AND ROSA LOWENSTEIN.

BLATCHFORD, J.—This is an appeal by the petitioning creditor from the taxation of costs by the Register on the dismissal of the petition in a proceeding in involuntary bankruptcy. The items allowed and complained of by the creditor, were all of them properly allowed, except the item of ten hundred and seven dollars and fifty cents, for four hundred and three days at two dollars and fifty cents per day, allowed to the late marshal as expenses of keeping property from November 11, 1867, to December 17, 1868. The item is charged by the late marshal as expenses. But his affidavit in regard thereto is defective, inasmuch as it only states that such expenses were necessarily incurred by him, and are just and reasonable. It ought to state that they have been actually incurred and paid by him, and are just and reasonable. The 47th Section of the Bankruptcy Act allows to the marshal, for custody of property, his actual and necessary expenses, upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable; the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of said expenses. By the fee bill of February 26th, 1853 (U. S. Stat. at Large, 164), the marshal is allowed the necessary expenses of keeping property attached or libeled in admiralty, not exceeding two dollars and fifty cents per day. The word "expenses" implies an expenditure or payment, and nothing can be allowed as expenses under Section 47 which is not shown affirmatively to have been necessary and just and reasonable in amount, and to have been actually paid. The rule in admiralty is, that to authorize an allowance for a keeper, it must be shown that he was necessarily employed from a prudent precaution in regard to the interests of all concerned in the property; that he actually continued in charge of the property for the time charged, and that the sum charged was not only paid, but was reasonable for the service. (1

Blatchford and How., 94, 113.) The same rule has been applied to the case of a seizure of the marshal of property proceeded against by the United States, by information, as forfeited under the Internal Revenue Laws (three hundred barrels of alcohol, 1 Benedict, 72). The proofs taken in the present case, on the taxation before the Register, are not sufficiently full as to the necessity for the employment of the keeper charged for, or as to his actual daily continuance in custody of the property. As to his payment, they not only do not show that he was paid the amount charged, but they show that he was paid but a small part of it. The rule laid down in the case last cited, is the proper one, and must be followed. It is this: "The sum actually paid a keeper to watch property in custody, not exceeding two dollars and fifty cents a day, may be taxed by the clerk, upon satisfactory proof that a prudent precaution in regard to all concerned in the property, justified the marshal in placing a keeper over it; that the keeper actually continued in charge of it for the time specified, and that the sum charged therefor is reasonable for the service, and has been actually paid by the marshal."

The case is referred back to the Register as to this item of keeper's fees, to take further proofs, if offered, and tax the item on the principles above laid down.

The motion made by the petitioning creditor, to offset his claim against the debtor, against the costs, when taxed, is denied.

G. A. Seixas, for the creditor.

J. H. V. Arnold, for the debtor.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

The usual order and subpœna were issued for the wife of bankrupt to attend before the Register and be sworn and testify as a witness. She failed to appear, and counsel put in affidavit explanatory of her non-attendance, but questioned the authority of the court to compel her to testify in this cause.

Held, the proper proceeding is to issue an order to show cause why an attachment should not issue against her.

In re GARRET S. BELLIS AND JAMES MILLIGAN.

THE attorney for the assignee in this cause applied before me for the usual order and subpœna for Mrs. Elizabeth R. Milligan, wife of James Milligan, one of the petitioners. The affidavit sets forth the facts, and is sufficient both in form and substance, is duly verified, and upon it the assignee is, by law, entitled to the order and subpœna asked for. (*In re* Julius L. Adams, 2 N. B. R., 95, 272.) Section 26 of the Bankrupt Law provides: "For good cause shown, the wife of any bankrupt may be required to attend before the court to the end that she may be examined as a witness, and if such wife do not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge, unless he shall prove, to the satisfaction of the court, that he was unable to procure the attendance of his wife."

During the trial of this cause, and before the issuing of this order and subpœna, I permitted the attorney for the bankrupts to file an affidavit under Section 26 of the Bankrupt Law, setting forth the reason why she had not obeyed previous orders of the court. I considered that to be the correct practice in order to raise the question under Section 26 of the Bankrupt Law, as to whether the disobedience of the wife to the mandate of the court prohibited the bankrupt Milligan from receiving a discharge. I consider it a well-settled rule of law, that the wife of a bankrupt must obey the orders of the court the same as any other witness, especially when, as in this case, it is shown that within a short time previous to the filing of a petition in bankruptcy by the husband he conveyed to her certain real estate, which now stands in her name of record, and the application asks for her examination touching said real estate. She must attend and be sworn; then any legal excuse or objections can be made in her behalf. "The courts do justice, and also require implicit obedience to their mandates." Any excuse or explanation can at the proper time be given. Courts are very lenient wherever a just or proper cause is

shown—sickness and debility are proper excuses. Such excuses should, however, be shown by the certificates of physicians. In this case such certificates, if the facts warrant them, can readily be procured. None, as yet, have been produced before me.

The return of the United States Marshal shows that the witness was paid certain fees for her attendance as a witness.

The proceedings in this cause before me show that the application for the examination of the witness was not made for delay, as the testimony of the witness, if given, must from the very nature of the case be of great materiality, both as to the assignee and the bankrupt Milligan.

The courts cannot administer the laws unless they can enforce obedience to their process and orders. It is not the province of the witness to question the rights, powers, or duties of the courts. It is their duty to obey. The courts will protect them in all their legal rights. In this case the question whether the wife can be a witness for or against her husband does not arise; as her husband has been adjudicated a bankrupt, his effects, if any, pass into the hands of the assignee, and the contest for the title to the real estate is between the witness and the assignee. Mr. Fuller, one of the counsel for the bankrupt, on presenting the affidavit giving the excuse for the non-attendance of the witness, made a very able and learned argument to show that the court had no power to compel the witness to testify in this cause, and on that ground, under Section 26 of the Bankrupt Law, opposed the granting of the order, and desired that the same be certified to your Honor.

I certify, as a matter of law, that this witness must attend and be sworn, and obey the order of the court the same as any other witness. That upon the affidavit showing that the witness was material, the assignee and creditors were entitled to the usual order and subpœna which were granted in this cause.

That under and by virtue of said order the witness was compelled to attend. That the excuses shown by the affidavit referred to, unaccompanied by certificates of physicians, were insufficient. That such excuses, and all others which may be

shown in extenuation for disobedience to the order of the court, should be shown before your Honor, upon the motion on the part of the assignee for an order to show cause why an attachment should not be issued against the witness, etc., etc.

BLATCHFORD, J.—Under the circumstances of this case, I think an order to show cause why a warrant should not issue is the proper proceeding.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

The Bankrupt Law requires merchants to keep proper books of account, with such reasonable fullness and accuracy as to enable the assignee to acquire the information which books are intended to disclose. But a temporary, accidental omission, in good faith, and for a reasonable time, to make entries, would not be a failure to keep books of account within the meaning of the law.

Merchants are responsible for the negligence of their clerks, and must see that proper books of account are kept.

Entries on numerous slips of paper, each entry on a separate slip, as a permanent form of keeping accounts, is not a keeping of books of account within the meaning of the law.

The clause of the 39th Section concerning any pledge, payment, conveyance, etc., of property, does not include consignments which do not change the title. But the allegation that goods were consigned to parties outside of the district in contemplation of bankruptcy, is sufficient as a charge of a removal from the district, and if done with a view of becoming bankrupt, and with the intent of keeping such goods from the assignee, is a sufficient charge that it was done to defraud creditors.

HAMMOND *v.* COOLIDGE.

ON the law points involved in this case, the charge to the jury was substantially as follows:

LOWELL, J.—The question whether the bankrupts kept proper books of account, is one of fact. The law requires that a merchant or tradesman should keep such books as, considering the nature and circumstances of his trade, are necessary for exhibiting to a person of competent skill the true state of his dealings and affairs. The charge here is, that during a certain specified period, about six weeks before the business stopped, the defendants kept neither a cash-book nor a ship-

ping book. You are relieved from embarrassment in the inquiry whether these books were proper, because it has been testified on both sides, and is not denied in argument, that these books were kept during some years, and were necessary; though of this you will judge, as of all other facts. No doubt the law means, not only that books of the right kind should be kept, but that they should be kept properly, that is, with such reasonable fullness and accuracy as to enable the assignee to acquire the information which books are intended to disclose. But the specification here merely is, that no books at all were kept of the sort mentioned during the period alleged, which would not be a sufficient allegation that such books, though kept, were imperfect, because it would not sufficiently point out to the defendants the accusation which they were expected to meet. You will remember the evidence. It tends to show that for a considerable time, ending with the actual stopping of the business, the books named were not in the hands of the bookkeeper, and no entries were made in them. It is said that certain entries were made on pieces of paper, and both sides have asked for rulings concerning such memoranda. As applied to this case, the only ruling I can give is this: That an accidental and temporary omission to make entries in proper books might not be within the law; as, for instance, if the books were taken from Natick to Boston to be used in an important trial, and, while they were detained, the clerk made full and accurate memoranda of all the transactions of the firm in such a way that he would be able to write up the books immediately on their being returned to him, it could not be said that the books were not kept. This is merely by way of illustration, and is said to have actually occurred in relation to these books in the month of December. Afterwards, it is said, the books were lost. If so, and if there were no reasonable expectation of finding them, or if they were not found within a reasonable time, it was the duty of the bankrupts to supply their place with others.

The question here turns on the time that you find the books to have been gone, the intent and good faith of the parties, and

whether they did all that prudent business men, intending to keep their accounts accurately, would naturally do. A temporary, accidental omission, in good faith, and for a reasonable time, to make the entries, would not be a failure to keep the books. But a neglect to keep them, on purpose, for a reasonable time, would be.

I cannot rule, as required by the bankrupts' counsel, that if they employed a clerk whom they considered competent, and left the whole charge of the books to him, they are to be discharged, whether the books were kept or not. The law does not require traders to keep a bookkeeper, but to keep books, and they are responsible to see that it is done. It is not a question of intent at all, nor of due diligence, excepting, as before explained, that an accident may be overlooked while a fraud would not be.

Nor can I rule that entries on numerous slips of paper, each entry on a separate slip, is a keeping of books under the law. As I have before ruled, it might do for a short time, in the absence of the books, but not as a system or policy of a permanent character. It is not important whether the book is bound or not, and accounts might be kept on sheets carefully preserved together.

You will decide what was done in this case, and whether it amounted to the keeping of the books during the time or about the time specified, under the rules above laid down.

The concealment of the books from the assignee does involve the question of intent. If the books were accidentally lost, before the bankruptcy, there can have been no such concealment. If they were not lost, but within the control of the defendants, and not given up on demand with intent to prevent the assignee from obtaining them, but their existence denied, the charge is sustained. It is not necessary that they should have been put in any unusual or out of the way place. The charge that certain goods were, at certain times, consigned to Mr. Henry of Louisville, Kentucky, in contemplation, on the part of the defendants, of bankruptcy, and with intent, etc., is relied on as a transfer of property, and as a removal of prop-

erty from the district. In my judgment the clause concerning any pledge, payment, conveyance, etc., does not include consignments which do not change the title, but are merely the employment of an agent. It is not shown that Henry had made any advances on the goods or had any pledge of them. It does seem sufficient, in substance—the defendant having waived objections of mere form, as a charge of a removal from the district, and if it was done with a view, at the time, by the defendants, of becoming bankrupt and having their property distributed under the law, and with intent to keep this property from their assignee, that is, in substance, a sufficient charge that it was to defraud their creditors. But as all this is alleged, though the contemplation of bankruptcy was not a necessary allegation, it must be proved. You will say therefore, whether, when these acts were done, if they were done, it was in the view and with the intent charged.

The jury found the bankrupts guilty.

H. W. Paine and *R. M. Morse, Jr.*, for creditors.

E. Avery, for bankrupts.

UNITED STATES DISTRICT COURT—E. D. NEW YORK.

Where judgments were obtained in good faith against a bankrupt, and levies, on executions issued under them, were made prior to the filing of his petition in bankruptcy, after which injunctions were granted by the Bankruptcy Court, which, after the lapse of several months, the creditors moved to dissolve, the assignee in bankruptcy having taken no steps in the matter;

Held, that as it did not appear that the property levied upon was worth more than the amount of the judgments, nor that a sale by the assignee would realize any more than a sale by the sheriff, and as there was no proof that any advantage would result to any creditor by continuing the injunction, it must be dissolved.

That the rights acquired by the judgment creditors by their levy must be preserved to them.

Whether the Bankruptcy Court has power to assume possession and control of property levied on by a sheriff prior to the proceedings in bankruptcy—*quære?*

In re JEREMIAH G. WILBUR.

THIS was a motion made in behalf of certain judgment cred-

itors of the above-named bankrupt, for the dissolution of an injunction previously issued by this court, restraining them from proceeding to collect upon execution the amount of certain judgments which they had obtained in a State court, and upon which execution had been issued and a levy made upon certain personal property prior to the filing of the bankrupt's petition.

BENEDICT, J.—It is clear, upon principle, and also, as I think, from the general scope of the provisions of the Bankrupt Act, that any rights which these judgment creditors have acquired in the personal property in question, by reason of their levy made prior to the filing of the bankrupt's petition, are to be preserved to them, and cannot be destroyed by the subsequent proceedings in bankruptcy. Whether, in any case, this court has the power, by virtue of any provision in the act, to assume the possession and control of the property levied upon by a sheriff prior to the proceedings in bankruptcy, and compel the judgment creditors to receive their debt at the hands of this court out of the proceeds realized from a sale of such property to the assignee in bankruptcy, is a question not free from difficulty. But, if such a power exists, it is to be exercised with caution, and not to be resorted to unless it appears necessary to protect some substantial right or prevent injustice. As this case appears from the papers, no advantage will be derived from the interfering with the proceedings upon the execution in the hands of the sheriff. It is not claimed by the assignee that the property levied upon exceeds in value the amount of the judgments, nor that a sale of it by the assignee will realize any greater sum than a sale by the sheriff. Although the injunction was granted in July, and the assignee appointed September 3d, it does not appear that the assignee has made any demand upon the sheriff for the property, or taken any steps towards securing possession of it; nor has any application been made by him for leave to discharge the levy by payment of the amount due upon the judgments, while it is conceded that the judgments were obtained in good faith, without fraud or collu-

sion. Upon such a state of facts, and in the absence of evidence of any advantage to result to any creditor from the interference of this court by a continuance of the injunction, I have no hesitation in directing it to be dissolved.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where bankrupts were under arrest by the sheriff upon process of State court,

It was, on *habeas corpus*, *Held*, that the United States District Judge cannot in such case properly inquire into the fact whether the debt or claim upon which the order of arrest was founded was or was not one from which the bankrupts could be discharged by a discharge in bankruptcy, or whether the bankrupts were liable by the State law to arrest; but he has solely to determine whether the State court, in its order of arrest, intended to found it on a claim or debt not dischargeable in bankruptcy.

It being determined from an examination of the plaintiff's affidavit, on which the order of arrest was founded, that the court had so intended, *Held*, the prisoners should be remanded to the custody of the sheriff.

In re ABRAHAM VALK AND JAMES S. VALK, *on Habeas Corpus*.

BLATCHFORD, J.—Abraham Valk and James S. Valk filed their voluntary petition in bankruptcy in this court on the 15th of December, 1868, and were adjudicated bankrupts on the 21st of December, 1868. They have applied for their discharges, but have not yet received them. On the 14th of September, 1869, an order was made by a Justice of the Supreme Court of the State of New York in a civil suit brought therein against Abraham Valk, James Valk, Morris Valk, and John Valk, by Benjamin Van Biema, requiring the Sheriff of the City and County of New York to arrest Abraham Valk, James Valk, and John Valk, and hold them to bail in the sum of thirty-eight thousand dollars. On that order Abraham Valk and James S. Valk were arrested by the said sheriff on the 20th of September, 1869, and they are now in his custody by virtue of said order. They are now before this court on a writ of *habeas corpus*, and their discharge is applied for, on the ground that they are imprisoned in violation of that clause of the 26th Section of the Bankruptcy Act, which provides that "no bankrupt shall

be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." The order of arrest was founded solely on an affidavit made by the plaintiff in the action. The only question to be inquired into on the return to this writ is, whether or not that affidavit shows that the order of arrest was founded on such a debt or claim as the 33d and 34th Sections of the Bankruptcy Act declare shall not be discharged by a discharge, viz.: One created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character. This court cannot go into an inquiry as to whether or not the debt alleged to be due to Van Biema was in fact one so created. It cannot try that question on affidavits, or by proofs. It can only inquire whether or not, from the face of the papers on which the State court acted in making the order of arrest, it appears that the State court founded the order on a debt so created. If this court sees, from the face of those papers, that the State court, in ordering the arrest, must have done so because it regarded the case made out by the papers to be one of a debt so created, it must regard the arrest as founded on such a debt, and must hold that the bankrupts were liable to such arrest. This was the doctrine laid down by this court in the case of *In re* Kimball, 2 N. B. R., 483, and by Mr. Justice Nelson in the Circuit Court in the same case. There are several causes for which arrests in civil actions are allowed by the State law of New York, which do not amount to such fraud, embezzlement, or defalcation as are specified in the 33d Section of the Bankruptcy Act. Hence the necessity for an examination by this court of the papers on which the arrest is founded, not to determine whether the bankrupt was liable, by the State law, to arrest, or whether he was arrested on a debt which is in fact not dischargeable in bankruptcy, but solely to determine whether the State court intended, in ordering the arrest, to found it on a debt or claim which would not be discharged by a discharge in bankruptcy. The distinction is a plain one. If the bankrupt claims that,

on the merits, the facts on which the State court acted in ordering his arrest did not exist, he must try that question in the State court, and not in this court. Therefore, I cannot look into the voluminous evidence which was taken on the reference made under this writ. I can only examine the affidavit of the plaintiff, on which the order of arrest was made. I have done so, and am satisfied that the State court must, on that affidavit, have believed that the debt in question was created by the fraud of the bankrupts, or by their defalcation while acting in a fiduciary character, and must, on that belief, have ordered the arrest.

The writ must be discharged and the prisoners be remanded to the custody of the sheriff.

Beebe, Donohue & Cooke for the bankrupts.

John McKeon and *P. C. Talman* for the sheriff and the creditor.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Dividend was ordered on claims of certain lawyers for alleged professional services rendered bankrupt.

Held, reference ordered to Register to examine into the proof of such debts, and the Register and assignee restrained from further proceedings until further order of the court.

Motion to vacate an order for a dividend may be made on proper papers and notice.

In the matter of THE NEW YORK MAIL STEAMSHIP COMPANY, *bankrupt.*

BLATCHFORD, J.—In this case, an order must be entered in the usual form, referring it to the Register in charge of the case to examine into the three proofs of debt filed by Horatio P. Allen, Marshall B. White, and others, and Brown, Hall & Vanderpool, with a view to determine their validity and proper amount. It is impossible for me to determine, on the paper before me, whether the declaration of the dividend ordered at the second meeting of creditors, ought or ought not to be set aside, but the case is a proper one to restrain the Register and

the assignee from taking any further steps towards making or paying such dividends, until the further order of the court, with a view to give an opportunity to any person interested to apply to the court, on proper papers and proper notice, to vacate the order for the dividend.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

Bankruptcy. Restraining order. No judgment can be rendered against a third person, for contempt in disobeying an injunction issued in aid of the writ of bankruptcy, without proper proceedings taken against him, distinct from those against the bankrupt.

Creditors *v.* Cozzens & Hall.

The creditors of Cozzens & Hall filed their petition, praying that the debtors might be adjudged bankrupts, setting forth several and distinct acts of bankruptcy, and in their petition they also alleged that the debtors had fraudulently transferred and conveyed goods to one McCreery, who had them in possession, and was disposing of them in fraud of the creditors; and praying an injunction against McCreery to restrain him from making any transfer or disposition of the goods so conveyed.

The injunction was granted upon notice, and McCreery subsequently appeared and denied all the acts of bankruptcy charged against the debtors, as well as the acts charged against himself. Being charged with a contempt in violating the restraining order, the matter was referred to a commissioner to take and report testimony, and upon the coming in of the report, the parties submitted the case upon the merits, as well as the question of contempt. The debtors had been adjudged bankrupts pending the proceedings for contempt.

Treat, J.—The matter of the contempt committed by McCreery, as well as the merits of the case as between himself and the assignee of Cozzens & Hall, are submitted upon the

papers, and the mass of evidence reported by the commissioner. But before passing upon the merits of the case, as between the assignee and McCreery, it is necessary to examine the issues presented by the pleadings, and upon looking at the papers there are no pleadings.

The restraining order, issued against a person other than the debtors, by virtue of Section 40 of the Bankrupt Act, at the commencement of the proceedings, is temporary only, and is intended to restrain the disposition of the goods and property of the debtor until an adjudication can be had, and an assignee appointed to take charge of the assets for the benefit of the creditors. The order is in aid of the writ; if the property is in the possession of the debtor, upon the adjudication of bankruptcy, the warrant issues to the marshal to take the property as assets of the debtor; if it is in the hands of a person other than the debtor, and any relief is sought against him, the proper proceedings must be instituted, either by suit at law or bill in equity, so that the court may pass upon the matters, either by a judgment or decree, according to the nature of the case.

In this case, the assignee has not brought any suit against McCreery; the only proceeding against him is one for contempt in violating the injunction ordered upon the original petition filed against the debtors, with which McCreery had nothing to do; for it was a matter immaterial to him whether the debtors were adjudged to be bankrupt or not, and as a bill in equity the petition would be multifarious. The court, therefore, will take no action upon the case until the proper issues are made up between the parties, so that the court can make either a decree upon bill and answer, or submit the issues of fact to a jury, if relief be sought at law.

By the present rules, when a restraining order is asked for at the commencement of the proceedings, against any person other than the debtor, separate petition must be filed, so that the proceedings upon the injunction need not be complicated with those praying the adjudication of bankruptcy.

UNITED STATES DISTRICT COURT—WISCONSIN.

A, B & Co., creditors, after having received information of the insolvency of C, accepted a chattel mortgage on his stock, subject to a prior mortgage and possession of D, another creditor. The evidence showed that C was insolvent, as represented to A, B & Co. C having been adjudged bankrupt, it was *Held*, that A, B & Co.'s mortgage was fraudulent, and could not be paid out of the sale of the goods it purported to convey.

In re PALMER.

MILLER, J.—Lathrop, Ludington & Co. presented their petition to the court, praying an order for the payment, by the assignee, of their debt against the bankrupt. The petition was answered by the assignee, alleging that the chattel mortgage given by the debtor to secure this debt was given in preference to these creditors, and was received by them in violation of the Bankrupt Law.

It appears that the bankrupt was indebted to these creditors about one thousand four hundred dollars overdue, and to secure payment of the debt, he gave them six promissory notes, on the 24th day of October, 1867, payable in certain amounts monthly thereafter for six months, and also a chattel mortgage on his stock of goods expressed therein, "subject to two prior mortgages to A. E. Hill, on file in town clerk's office, and with condition that said Hill is to take, and does now take, and hold actual possession of said chattels mortgaged, as agent for said mortgagees, and holds possession as well under this as under his own mortgages."

The petition in bankruptcy was filed February 1, 1868. The mortgaged stock of goods was sold by the assignee pursuant to an order of court. The two mortgages to Hill, by order of court, have been satisfied out of the proceeds of sale. The debt of Hill amounted to about fifteen hundred dollars, of which a great portion was overdue at the date of this mortgage. And Hill at that time had the key and full possession of the store. George W. Chapman, the agent of Lathrop, Ludington & Co., knew of the lien of Hill on the goods, and of his possession, and accepted the mortgage, subject to the

condition above recited. But he testifies that from Palmer's statement of his (Palmer's) affairs, he did not believe him insolvent, nor had reasonable cause to believe his insolvency.

Bruce testifies that, in the city of New York, in the fall of 1867, he informed Ludington that Palmer could not last to exceed six months, and advised him to have his claim collected as fast as possible. Very soon after that conversation, Chapman came to Oconomonoc, and accepted the mortgage. Chapman believed Palmer had adequate means for the full payment of his debts on time. Palmer gave the notes and mortgage to Lathrop, Ludington & Co. for the purpose of gaining time, not being then able to pay over one hundred and seventy-five dollars of the debt, and a great portion of his debts were then overdue. The petition in bankruptcy, filed three months after the date of the notes and mortgage to Lathrop, Ludington & Co., shows Palmer to have been in a state of insolvency when the mortgage was given, and proves that the notice of Bruce to Ludington was correct. Palmer testifies that he might have paid his debts in time, if Lathrop, Ludington & Co., had not crowded him.

The Bankrupt Act prohibits the giving of preferences by an insolvent debtor to any of his creditors, and declares such preference void where the person receiving a preference has reasonable cause to believe the debtor insolvent.

Insolvency is defined to be the state of a person who has not property sufficient for the full payment of his debts. (Law Dictionary, by Wheaton.) In *Buckingham* v. *McLean* (13 How., 167), the court declares insolvency to mean an inability to pay as debts should become payable, whereby the debtor's business would be broken up.

The evidence shows that Palmer was in a state of insolvency when he gave the notes and mortgage to Lathrop, Ludington & Co.; Ludington was notified of Palmer's embarrassed condition immediately anterior to the date of the securities. This claim was overdue, on which time was extended from one to six months. The agent was apprised of Palmer's inability to pay a large amount of overdue debts, and he accepted the

mortgage, subject to Hill's prior mortgages, and absolute possession and control of the stock.

It is evident from Palmer's schedules, annexed to his petition in bankruptcy, that when he gave the notes and mortgage to Lathrop, Ludington & Co., he was largely insolvent, and which the sale of his goods and property by the assignee clearly demonstrates. The mortgage in this case not being made by Palmer in the usual and ordinary course of his business, the fact is, by the Bankrupt Law, declared *prima facie* evidence of fraud, which the mortgagees have not removed or overcome. They and their agent had reasonable cause to believe Palmer insolvent when they accepted the mortgage.

The petition of Lathrop, Ludington & Co., for payment of their claim by the assignee out of the proceeds of the sale of the goods and merchandise covered by the mortgage, is denied.

UNITED STATES DISTRICT COURT—E. D. NEW YORK.

Where creditors of a bankrupt had adopted a resolution appointing trustees under Section 43 of the Bankruptcy Act, the confirmation of which was opposed,

***Held*, that the parties desiring the confirmation of the resolution were the moving parties, and should serve their papers on the opposing parties, that they might answer them.**

In re THE AMERICAN WATERPROOF CLOTH COMPANY.

IN this case the creditors had adopted a resolution, under Section 43 of the Bankrupt Act, appointing trustees, and the matter of confirming the resolution came up before the court. Some of the parties interested contested the confirmation of the resolution, and the question of the practice in such a case was discussed.

Judge BENEDICT held that the parties desiring the confirmation of the resolution should be considered the moving parties, and directed that they should, within a week, file and serve such papers as they saw fit in support of their motion, and that the opposing parties have two weeks to file and serve papers in opposition thereto.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

Bankruptcy—discharge refused by court. It is the duty of the court to refuse a discharge to the bankrupt where, upon an inspection of the record, it appears that he has done those acts which prevent his receiving a discharge, although no objections are interposed by creditors.

In re JOSEPH L. WILKINSON.

Per Curiam.—The bankrupt applied to be finally discharged, no objection being interposed by creditors. The court, upon inspecting the record of the bankrupt's examination by the assignee, discovered that since the passage of the act the bankrupt had lost a large sum of money at gambling.

The discharge was refused, the court holding that it was its duty to examine the record before granting a discharge, and if it appeared that the bankrupt was not entitled thereto, to refuse it, although creditors interposed no objection.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

The giving of a note by a debtor, and causing it to be sued for the purpose of preventing an attachment by a creditor, is an act which has a direct and necessary tendency to defeat and delay creditors generally, though it is aimed against one only.

So long as joint debts of a firm remain outstanding and unsettled, proceedings in bankruptcy, whether voluntary or involuntary, may be joint.

In the case of an involuntary proceeding in bankruptcy, the payment into court by the debtor of the amount due the petitioner, in pursuance of a previous tender, cannot defeat the petition, it not being proper for the petitioner, when the debtor is insolvent, to accept payment in full at the expense of the other creditors.

In re GRANVILLE WILLIAMS & ANDREW WILLIAMS.

LOWELL, J.—This is a petition filed June 28, 1869, by creditors, to have the two respondents adjudged bankrupt. The hearing has been delayed by consent of parties.

The petition declares that the respondents are partners under the firm of G. Williams & Co., that the firm owe more than three hundred dollars, etc., and that the said G. Williams and A. Williams made a fraudulent conveyance of their property,

and did certain other acts within the statute. The evidence shows that the assets of the firm consisted of the machinery, fixtures, and stock of a small paper-mill, and the leasehold estate on which the mill stood, and one credit of about three hundred dollars. On the 29th of March the respondents conveyed the machinery, etc., to their brother, Emory Williams, by a bill of sale which was executed at about three o'clock, and recorded at five o'clock on that morning; that in the course of the same morning they sent for a person to whom they owed a debt of some sixty dollars, and gave him a note for three hundred dollars, dated back about a month, with the agreement, which was carried out, that he should sue and attach the only debt due them, which was for about three hundred dollars, as above stated. It appears that a creditor, one of these petitioners, had threatened to sue them by noon of that day, unless they gave him security. It was admitted that the giving the note and causing it to be sued were for the purpose of preventing an attachment by the petitioner Roberts, but it is said that the real object of thus withdrawing the fund was not to delay the creditors generally, but only Mr. Roberts, and that it was the purpose of the respondents to use the money to pay their workmen. This defense, if true, will not avail. The act had a direct and necessary tendency to defeat and delay creditors generally, though aimed at one only. The immediate result was to give the respondents the secret control of this fund, under the guise of an adverse attachment. It is impossible for the court to go beyond that result and determine on doubtful evidence, or any evidence, that the parties intended, when the fund was illegally withdrawn from the ordinary reach of the law, to apply it more beneficially than the law itself would apply it. This is a fundamental principle of the law of fraudulent conveyances.

It seems to me that this act comes fairly within the language of the statute: "or shall conceal any of his property to avoid its being attached," because this means not only the physical removal or concealment of a chattel, but the concealment of the actual title and position of property, of whatever kind.

See O'Neil & Glover, 5 Gray, 144. But it is not declared in the petition under that clause, but as the procuring by insolvent debtors of their property to be taken on legal process with intent to give a preference; and this requires me to decide whether the respondents were insolvent on the 29th of March.

It must be remembered that the well-settled meaning of insolvency under this act, is an inability, in the case of a trader, to pay his debts as they mature; and tried by this test, the respondents were insolvent then, as they are admitted to be now.

This being so, the attachment would effect, and must have been intended to effect a preference of the creditor with whom the scheme was made, and of the workmen too, if the intent were what it is said to have been.

It was urged that the conveyance amounted to a dissolution of the partnership, and that the court has no jurisdiction of a petition filed after a dissolution. The words of the 36th Section of the act, "that where two or more persons who are partners in trade shall be adjudged bankrupt," etc., seem at first sight to point to an adjudication only in respect to existing partnership.

But upon examination of the scope and purpose of the act, it appears that a joint action is necessary to the effectual winding up of partnership affairs. If the partners, after a dissolution, must always proceed separately, upon as many petitions as there are partners, great confusion will arise in marshaling the assets, and great and wholly needless expense in the administration of the bankruptcy. On general principles, the firm continues to exist for all purposes necessary to the final liquidation of their affairs. And by analogy to actions at law or in equity, as well as from considerations of high expediency, it would seem that where partnership affairs are to be wound up, the partners may join or be joined in one petition. If it were not so, the partners would always have it in their power to defeat one of the main provisions of the law, which is that the creditors of the firm shall choose the assignee. The decisions, I know, were not entirely uniform under the law of 1841, but the Massachusetts doctrine was that there may be a

joint petition so long as joint assets remain to be distributed, *McDaniel* v. *Ring*, 5 Cush., 469; and Judge Blatchford has intimated a concurrence in this view, which accords with the practice under our present law, and with the reason of the case, *Re* Crockett *et al.*, 2 N. B. R., 75 *quarto*, 208 *octavo*. In my opinion, a like result must follow if there are joint debts outstanding. It is for the benefit of the joint creditors, so long as any remain, that the proceedings should be joint, because they have the choice of the assignee. Whether there are any joint assets or not, may often be disputed, and be the very question which an assignee is needed to try; as would be the case here if all the property had been transferred, instead of nearly all; but the fact of joint creditors whose rights are to be protected, is easy of ascertainment, and when ascertained, shows a necessity for joint action.

It is a mere question of joinder of parties; and I hold now, as I have held before, in a case not reported, that so long as joint debts remain outstanding and unsettled, the proceedings, whether voluntary or involuntary, may be joint. In the present case there is no dispute that there were assets, because the credit of three hundred dollars was an outstanding partnership credit at the date of the petition.

The other objection is that the petition does not distinctly allege that the property and credit in question were vested in the firm. But considering the whole petition, I think it does sufficiently appear that the frauds which are set out as done by the two partners, were done in respect to the partnership property. This is the fair and reasonable construction of the allegations.

The evidence concerning the bill of sale was not quite so clear as that relating to the attachment. On the one side, it appears to have been made to a brother, and one not engaged in the business of a papermaker, and at an unusual hour; and on the other, that some money was paid to each partner, and a note or memorandum given for the balance. As the allegation concerning the attachment is sustained, it will not be necessary to consider this matter fully. I will only say that by our law

a conveyance may be an act of bankruptcy in the grantors, although no fraudulent intent is known to or participated in by the grantee. I have before had occasion to point out the important difference between our statute and the English law in this respect. In our system the title of the assignee relates only to the filing of the petition and not to the act of bankruptcy, excepting when that act is the filing of a voluntary petition. It follows that an adjudication of bankruptcy does not, *per se*, affect the title of the purchaser. And the statute expressly says that if a person is adjudged a bankrupt for any conveyance, etc., the assignee may recover the property, provided the person receiving the payment or conveyance had reasonable cause to believe that a fraud was intended, etc.

I do not mean to say that this is, or is not, such a case.

One other matter arose accidentally. Neither petitioner alone had a debt amounting to two hundred and fifty dollars. In the course of the hearing the respondents paid into court, in pursuance of a tender made on the day before, the amount due to one of the petitioners, and professed a readiness to pay the other. This cannot defeat the petition. The debtors are confessedly insolvent now, and it would not be proper for the petitioners to accept payment in full at the expense of the other creditors.

It has been always the law and practice here under the Massachusetts statute, to consider all partial settlements by insolvents as in themselves acts of bankruptcy, and it is well understood that if a single creditor stands out, no arrangement can be made excepting through the Bankrupt Court.

This is so well understood, that no case has ever arisen or is likely to arise in this district which will call for an express decision whether such an arrangement, however fairly intended, can be made. In this case the petitioners were well justified in refusing the tender.

J. J. Cutter, for petitioner.

J. Spaulding, for respondents.

UNITED STATES DISTRICT COURT—OHIO.

A, carrying on business, gave his sister a chattel mortgage upon his stock in trade. The mortgage was duly filed for record, but A retained possession of the mortgaged goods, continued business, and was subsequently adjudged a bankrupt.

Held, that the mortgagee had no title to the mortgaged goods paramount to that of other creditors.

In re Manly.

OPINION OF THE COURT.

Leavitt, J.—The question before the court is on a motion, by the counsel of Ellen M. Manly, for an order to the marshal to deliver to her a lot of books, stationery, etc., seized by the marshal as the property of the said T. M. Manly, against whom there has been an adjudication of bankruptcy, on the petition of Strange, Saunders & Co., creditors of the said T. M. Manly. The property in dispute is claimed by E. M. Manly, the sister of the bankrupt, under a chattel mortgage, given to secure a debt due her from her brother. The question to be decided on this motion is, whether this mortgage vested a title to the property in E. M. Manly, or whether it was to the claim of his creditor, and passed to the assignee of said T. M. Manly.

The facts necessary to notice are briefly these: The said T. M. Manly, under the name of T. M. Manly & Co., had been in business for some years in Cincinnati as a retail bookseller and stationer, prior to the institution of the proceedings in bankruptcy. His sister, the said E. M. Manly, had from time to time advanced money to assist her brother in his business, until the 16th of October, 1868, when these advances amounted to one thousand five hundred dollars, and on that day T. M. Manly gave his note to his sister for that sum, payable one day after date, and at the same time executed the chattel mortgage to secure the payment of the note, including all his stock in trade, and the furniture and fixtures pertaining to his place of business. The mortgage was duly filed in the office of the Recorder of Hamilton county, pursuant to the statute of Ohio.

On the 12th of February, 1869, the firm of Strange, Saun-

ders & Co., filed their petition in bankruptcy against T. M. Manly, praying, for the cause assigned, that a decree of bankruptcy might be entered; and such proceedings were had that a decree in bankruptcy was entered in this court on the 19th day of February, in the year aforesaid. A warrant issued to the marshal, requiring him to take possession of the property of the bankrupt, pursuant to the requirement of the statute. A restraining order, prohibiting Manly, and all others, from interfering with or disposing of the property, had been issued on the 15th of February, and was duly served and returned.

After the commencement of the proceedings in bankruptcy, but before the service of the restraining order, and before the decree in bankruptcy, that is to say, between the 15th and 19th day of February, Ellen Manly proceeded to the store of T. M. Manly and demanded payment of the note for one thousand five hundred dollars, which was refused. She then demanded possession of the goods or merchandise included in her mortgage; and goods and merchandise valued at one thousand one hundred dollars were delivered to her and she caused them to be removed from the store, and they were taken to, and deposited at, another place in the city. Subsequently, upon the application of the petitioning creditors, the marshal was ordered to take possession of the property thus removed, and now holds it in custody. As before stated, the object of the pending motion is, that this property may be restored to E. M. Manly, as the owner, under the mortgage executed on the 16th of October, 1868.

This motion has been argued at great length by counsel, and is now submitted for the decision of the court. The only question is, whether E. M. Manly has the legal title to the property in controversy, under the chattel mortgage which has been referred to. No question arises as to the validity or invalidity of the sale or transfer of the property under the 35th Section or any other provision of the bankrupt statute. From the facts before the court, presented by the affidavits and other proofs, it does not appear that T. M. Manly was insolvent on the 16th of October, 1868, when he executed the mortgage to his sister, or

that she had reasonable cause to believe her brother was then in a state of insolvency, or contemplated bankruptcy. The question, therefore, as to the validity of the chattel mortgage, and the title or claim of E. M. Manly to the property included in it, must depend on the general principles of law applicable to such mortgages, and to the facts in connection with it. I regret that the pressure of other duties will not allow me to attempt, at length, to investigate this question, and refer to and analyze the various authorities cited by counsel. I am relieved, in some measure, from the necessity of doing so, by the consideration that the decision of the question in this summary way, upon the pending motion, will not be conclusive upon the parties, or bar them from pursuing other proceedings to test the legal title to the property in controversy. I will state, therefore, very briefly, the conclusions which I have reached in the consideration of the question.

And I may remark, in the first place, that, from the facts before the court, there is no reason to doubt that, at the date of the execution of the mortgage, T. M. Manly was justly indebted to his sister, the mortgagee, in the sum named in the mortgage, and for which the note was given. The transaction may have been in good faith, as between the brother and the sister; but that consideration will not give validity to the mortgage, if the after conduct of the parties was such as that, upon principles of public policy and settled law, the rights of other creditors must be deemed paramount to the claim asserted under the mortgage.

There is no controversy as to the legal principle that any sale or conveyance of chattel property with a provision expressed or clearly implied that the vendor or mortgagor, as the case may be, is to continue in possession, with the right to sell or exercise other acts of ownership over it, is, *prima facie*, fraudulent and void as against the creditors of the vendor or mortgagor. The doctrine in England and in this country was, until a comparatively recent period, that such a sale or transfer was, *per se*, fraudulent and void. But it has been modified by the decision of the courts, so that now it is presumptive only of fraud, and

such presumption may be rebutted and overcome by explanatory proof that there was neither actual nor constructive fraud in the transaction. But I am not aware that it has ever been held that where the sale or transfer has been made without any change of possession, or apparent change of ownership, and the vendor or mortgagor has held himself out to the world as the owner, and obtained credit as such owner, that any state of facts can be made out of sufficient force to repel the inference of fraud.

And it seems to the court that a case warranting the legal presumption of fraud, could not be more clearly made out than in the case of the mortgage in question. Manly was a retail dealer in books and stationery. On the 16th of October, 1868, he executed the mortgage to his sister. It covered his entire stock in trade, including the furniture of his store. It was given to secure the payment of a note due one day after date. He was permitted to hold the possession of the mortgaged property, and carry on business precisely as before the mortgage was given; and it is proved that he not only sold articles mortgaged, but that he made purchases of additional stock. This was done, with the knowledge and consent of Miss Manly, from October until the following month of February. And it was not till after the petition in bankruptcy was filed against her brother, that she made any claim to the possession of the property. When claimed, without any inventory being made and without any effort to identify the specific articles covered by the mortgage, the books were, in a very loose and hurried manner, taken from the store of her brother and transferred to another place in the city.

It is true, in reference to the mortgage, that it contained no express provision that the mortgagor should continue in possession, with the right to dispose of the mortgaged property. But the understanding and intent of the parties are to be inferred from their acts. It is in evidence that the mortgagor was permitted to retain possession. It is so set forth in the affidavit of Miss Manly; and, by the clearest implication, there was a power in the mortgagor to sell or dispose of the property.

The mortgagor so understood it, and continued to make sales till the store was closed in February, 1869. As a necessary result, it was impossible that the identical property mortgaged could be restored to the mortgagee. As there was no provision in the mortgage that articles sold might be replaced by others of the same description, the identification of the mortgaged articles was an impossibility. It could not operate, therefore, as a lien on the specific property mortgaged; and, in the language of the Supreme Court of Ohio, in the case of *Collins et al.* v. *Myers et al.* (16 Ohio R., 547), could have no other effect than to "ward off creditors."

I have looked into the cases, especially the Ohio cases, which have been cited by counsel on both sides. As I understand these cases, there is not one that sustains the principle that a chattel mortgage, with the right in the mortgagor to retain possession of the mortgaged property and to sell or dispose of the same, is not fraudulent as to creditors.

It is strenuously insisted that under the law of Ohio requiring chattel mortgages to be filed in the office of the County Recorder, when so filed, there is notice to the world of the lien created on the mortgaged property, and every one deals with the mortgagor at his peril. I do not propose to make any comments upon this statute, or analyze its provisions. It is most obvious that the construction insisted on by the counsel would most seriously embarrass commercial operations. If a dealer, knowing that another is carrying on his business in his own name, with every outward indication that he is the owner of the property of which he is in possession, and apparently prospering in business, is obliged to search the files of the recorder's office to ascertain if there is a mortgage on the property thus held out to the world as his own, it would be a serious drawback to all trading operations. In regard, especially, to dealers in distant cities or places, of whom credit was asked by an Ohio merchant, it would be exceedingly embarrassing if, before he could respond to the request for credit, he were obliged to search the files of chattel mortgages to ascertain whether he could safely give credit to the party requiring it. I cannot sup-

pose such was the intention of the law, and do not feel called on to give it a construction leading to such results.

In deciding that Miss Manly has no title to the property in question under her chattel mortgage, paramount to that of other creditors of T. M. Manly, I think I am fully sustained by the following authorities.*

The counsel for Miss Manly has eloquently expatiated on the great hardship which she will suffer if her claim to the property in question is set aside. The answer is, if she is a sufferer, it is her own fault. She had a perfect right under her mortgage to take full possession of the mortgaged property when her brother's note, payable one day after date, became due. The note not being paid then, the forfeiture under the mortgage could have been enforced and her debt secured. If, from a desire to aid him, or a misplaced confidence in the pecuniary ability of her brother, she permitted him to retain possession of the property, and carry on business as before, whereby honest dealers were induced to give him credit, she has no just ground of complaint. She stands upon the same ground as other creditors of Manly, and must be content to share a *pro-rata* dividend with them of the proceeds of his property.

The motion is therefore denied.

UNITED STATES DISTRICT COURT—OREGON.

Neither the actual nor alleged residence or place of business of the bankrupt can be directly made the ground of opposition to his discharge.

A person not a creditor at the time of alleged removal of property, or whose claim was barred by limitation at the time of such removal, cannot be heard in objection to discharge.

In re Burk.

Deady, J.—The bankrupt having applied for his discharge, certain persons, styling themselves "creditors of James Burk,

* *Collins et al.*, v. *Myers et al.*, 16 Ohio R., 547; *Freeman* v. *Rawson*, 5 Ohio S. R., 1; *Harman* v. *Abley*, 7 Ohio S. R., 219.

bankrupt," oppose such discharge, and specify as the grounds of their opposition the following:

First. Said Burk has not resided in or carried on business in said district of Oregon for six months immediately preceding the filing of his petition.

Second. Said Burk *has removed a part* of his property from the district with intent to defraud his creditors, to wit: Said Burk, on or about the middle of May, 1865, fraudulently *disposed of all* his property in said district, and fraudulently left said district with the proceeds of said property with intent to defraud his creditors.

The bankrupt, by his solicitor, "demurs to the specification of grounds of opposition" as "insufficient in law" to prevent the discharge prayed for being granted.

No specific direction is given in the act, or in the General Orders and Forms, as to the mode in which the bankrupt may question the sufficiency of the grounds of opposition to his discharge. Section 31, which authorizes the creditor opposing the discharge to specify the grounds of his opposition in writing, also provides that "the court may *in its discretion* order any question of fact *so presented* to be tried at a stated session of the District Court."

This provision seems to assume or imply that the court, before directing a trial concerning such "a question of fact," will exercise its discretion — judgment — and thereby determine whether the allegation of the creditor, if true, is sufficient in law to prevent the bankrupt from obtaining his discharge.

Whether the objection to the specifications should be taken by demurrer or exceptions analogous to those allowed in equity may be a question. But in one or the other of these modes it seems necessary and proper that the bankrupt should be allowed to question the sufficiency in law of the grounds of opposition to his discharge.

The first specification was abandoned on the argument as being too broad. The amended petition only avers that the bankrupt "has resided and carried on business in this district for the *longest period of time* during the six months next pre-

ceding the filing of his petition." The allegation is sufficient, and the objection that the bankrupt had not resided in or carried on business in the district for the full period of such six months may be true, and yet the bankrupt may be entitled to his discharge. Moreover, neither the actual nor alleged residence or place of business of the bankrupt can be directly made the ground of opposition to his discharge.

If he has willfully sworn falsely in relation to either—they being material facts—this fact, the false oath, may be objected to his discharge. (Section 29, Bankrupt Act.)

The second specification is founded on the clause in Section 29, which reads:

"Or has removed, or caused to be removed, any part of his property from the district, with intent to defraud his creditors."

This clause is preceded and followed by several others in the same section, united by the disjunctive conjunction "or," and separated by semicolons, each of which prescribes a distinct and independent ground of objection to granting a discharge. The second clause preceding this concerns the destruction, etc., of books, etc., and is qualified by the words "*since* the passage of this act." The clause in question contains no words limiting its operation to any point of time before or since the passage of the act. Counsel for the bankrupt insists that the qualifying words in the preceding clause apply to the subsequent one, so that the removal of property by the bankrupt, with intent, etc., must have been committed *since* the passage of the Bankrupt Act, or else it is not sufficient ground of opposition to his discharge.

The only reason given in support of this construction is, that the one clause follows the other in point of position in the section.

But these clauses, being separated by the disjunctive conjunction, have no dependence one upon another. Each only relates to the preceding enactment or demand, which declares:

"No discharge shall be granted, * * * if the bankrupt," etc.

Each clause is a statement of what constitutes a bar to the discharge, with only such qualifications of time and place as are therein expressly provided, or fairly to be implied from the nature of the subject and the language and object of the statute. Again, if the operation of any one clause following that concerning the destruction, etc., of books, etc., is, on account of the restrictive words in the latter, limited to the time since the passage of the act, why are not all of such clauses so limited? If the restrictive words, "since the passage of the act," apply to any one *following* clause, and because it is a *following* clause, they must, for the same reason, apply to all.

But the fact that the clause concerning the failure to keep proper books of account, which occurs still further on in the section, is expressly restrained to such failures occurring since the passage of the act, goes to show that in the opinion of the law-maker each clause, as to time, was independent of the other, and therefore the propriety and necessity of inserting express words of limitation or restriction in any clause which was not intended to apply to acts or omissions done or suffered prior to the passage of the act.

It being evident that the clause in question is not restrained by the language in the preceding clause, I next consider whether the nature of the subject or the language and object of the statute furnish any reason for construing the clause so as to limit its operation to removals of property occurring since the passage of the act.

The object of the Bankrupt Act is twofold:

First. To secure a just and equal distribution of the bankrupt's effects among his creditors; and

Second. To discharge the bankrupt from his debts, provided that he has not conducted himself dishonestly in the premises.

To remove one's property from the district or county where one has done business and obtained credit, *with the intent* to defraud the persons giving such credit, is intrinsically wrong, contrary to good morals, independent of the Bankrupt Act. Then, whether the property of Burk was removed from the

district before or after the passage of the act, it was equally a dishonest act, if done *with intent to defraud his creditors*, and ought to prevent his obtaining his discharge from his debts. If this be true, he may be a bankrupt, but not an honest one.

But a person who was not a creditor at the time of such removal, or whose debt was then barred by the statute of limitation, could not have been defrauded by it, and therefore cannot be heard to make the objection. Practically, as to him, it is not true.

So much for the principal question. The objections on the part of the creditors, or the persons styling themselves "creditors of James Burk, bankrupt," do not directly aver that either of them is a creditor entitled to make the objection, that is, a creditor who has *proved* his debt. "Form No. 53," of the General Orders and Forms, contains the averment, or more correctly speaking, recital, that the creditor has proved his debt, with a blank to be filled up with the amount. For aught that I know, the persons making these objections are *creditors* of James Burk in a general sense, but they cannot be regarded as his creditors in a court of bankruptcy until it appears that they have proved their debts.

The objections allege that the fraudulent removal of property by the bankrupt occurred in May, 1865, but it does not appear whether any of these alleged creditors were then creditors of Burk or not. If they were not, the removal could not have been made with *intent* to defraud them, and therefore the objection is insufficient.

I am also of the opinion that the specification concerning the removal of the property is altogether too vague and general to be reliable. *In re* Robt. C. Rathbone, 1 N. B. R., 294, Blatchford, J., in considering this subject, says:

"The specifications of the ground of opposition to a discharge must, under Section 31 of the act, and General Order, No. 24, be as specific as the specifications of the ground for avoiding a discharge after it is granted, required by Section 34 of the act. The allegations must be allegations of fact, and must be distinct, precise, and specific, and must not be allega-

tions merely in the language of Section 29 of the act, or allegations so general as really not to advise the bankrupt what facts he must be prepared to meet and resist."

The demurrer is sustained. The creditors may have further time to file amended objections in accordance with this opinion, if desired. What constitutes a removal of property, with intent to defraud creditors, will be reserved for the final hearing.

UNITED STATES DISTRICT COURT—DISTRICT OF KANSAS.

A firm, M., W., R. & Co., duly appointed B. & C. their attorneys, and proved debt in bankruptcy. Thereafter S. & H., a law firm, duly entered appearance for W., R. & Co., creditors, and filed specifications in opposition to bankrupt's discharge, signed (in the handwriting of S.) B. & C., and S. & H., attorneys for the opposing creditors. W. R. & Co, had proved no debt.

Held, the objecting creditors had no status on which to oppose discharge. S. & H. had no power to act for M., W., R. & Co. and the firm of W., R. & Co. had proved no debt.

In re CHARLES N. PALMER.

The bankrupt, Palmer, having filed his petition for discharge, of which due notice was given to all creditors who had proved their debts, Sawyer & Herman, attorneys, entered their appearance as attorneys for Weaver, Richardson & Co., and, in due time, filed specifications in opposition to the discharge, signed Sawyer & Herman, and Brown & Case, attorneys for opposing creditors. No debt was proved by Weaver, Richardson & Co., but a debt was proved by Mott, Weaver, Richardson & Co. The signatures to the specifications were in the handwriting of Sawyer, of the firm of Sawyer & Herman. They presented a power of attorney by Mott, Weaver & Richardson, constituting Brown & Case their attorneys.

It was insisted for the bankrupt that he was entitled to his discharge, and that the specifications should be treated as a nullity, because they were not filed by a creditor who had proved his debt, and because the attorney who signed and filed them had not been authorized, by power of attorney, to appear for the creditors named in the specifications.

DELAHAY, J.—No legal appearance has been entered by the objecting creditors. Parties seeking a status in court to oppose the discharge of the bankrupt, must prove themselves creditors by proving up their claims as required by the provisions of the Bankrupt Act. This, Weaver, Richardson & Co. have not done. No debt has been proved by them.

But the specifications would have been improperly filed if their debt had been proved. The power of attorney was made to Brown & Case, and does not confer the power of substitution. It gave Sawyer & Herman no power to act for the creditors. They had no authority to sign it as attorneys, and Sawyer had no authority to sign the name of Brown & Case. The paper, then, is a pure nullity, not made in behalf of one who has proved a debt against the estate, and not signed by any one legally authorized to act for any creditor.

There is, therefore, nothing in the case which the court can regard as an objection to the discharge of the bankrupt, and as he seems to have complied with all the provisions of the act, it is granted.

Z. E. Britton, for the bankrupt.

Sawyer & Herman, Hurd & Stillings, for the opposing creditors.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where a voluntary assignment under the State Law was adjudged valid, and debtors subsequently went into bankruptcy, a special receiver held moneys of bankrupts which had come to his hands through a voluntary assignment under the State Law adjudged to be valid.

Held, a proper portion thereof ought to be distributed among the creditors in bankruptcy, not through the assignee in bankruptcy, but direct by such receiver to the proper distributees. Reference ordered to Master to ascertain and report as to amount of dividend, distributees, etc., etc.

JOHN SEDGWICK, *Assignee, etc., v.* JAMES K. PLACE *and others.*

BLATCHFORD, J.—I think that so much of the moneys in the hands of the special Receiver appointed in this cause, as shall be ascertained to be a proper sum for the purpose, ought to be

divided among the creditors of Place & Sparkman. Those creditors are, all of them, represented by the plaintiff as assignee of Place & Sparkman as bankrupts, or by the defendants, Burritt & Sheffield, as voluntary assignees of Place & Sparkman. If such division shall be made among such creditors of Place & Sparkman as have proved their debts in bankruptcy, and on the assumption that the indebtedness of Place & Sparkman amounts, on the whole, to not less than the aggregate amount of such indebtedness, as stated in the inventory or schedule of the creditors of Place & Sparkman, filed in the office of the Clerk of the City and County of New York on the 13th of January, 1868, in pursuance of the State law in regard to voluntary assignments, and if the rate of such dividend shall not exceed the rate which would be divisible in case all the debts named in such inventory or schedule were proved in bankruptcy in addition to such debts proved in bankruptcy as do not appear in such inventory or schedule, the rights and interests of all creditors of Place & Sparkman who are represented by any of the parties to this cause will be fully protected. But such dividend ought to be made directly to such creditors by the special Receiver as part of the proceedings in this cause, and not by the assignee in bankruptcy as part of the proceedings in bankruptcy after a transfer to him by the special Receiver of the proper sum to be divided. There must be a reference to a Master, to ascertain and report on the above basis the proper sum to be divided, and to prepare a schedule of the distributees, and of the amounts of their debts, which ought to share in the dividend, and of the rate of dividend, and of the amount to be paid to each creditor. On the coming in and confirmation of the Master's report, the distribution, as reported, will be authorized.

F. N. Banks, for the plaintiff, and the special Receiver.

Marsh, Coe & Wallis, for the voluntary assignees.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Witness must answer all proper questions relating to his trade and dealings with the bankrupt prior to bankruptcy, and if necessary to answer such questions must produce any book containing the transactions with the bankrupt.

In re Mortimer L. Earle.

EXTRACT FROM EXAMINATION BY JAMES L. FLINT, BEFORE THE REGISTER.

Q. 75. Do you now produce a copy of your transactions with the bankrupt as contained in your book, or the books themselves for the period of one year previous to the bankruptcy of the bankrupt, say from July 1st, 1869? A. I do not.

Q. 76. Do you decline to produce it? A. I do.

The Register decides that the copy of transactions as required by the counsel of the assignee ought to be produced.

The witness declines to produce the same.

Sworn to before

Edgar Ketchum, *Register.*

Blatchford, J.—The foregoing matter contained in questions 75 and 76, and the answers thereto, having been referred to me by the Register, under Section 7 of the act, I decide that the witness must answer all proper questions on matters relating to his trade and dealings with the bankrupt prior to the commencement of the proceedings in bankruptcy, and that if, to answer properly and fully and truthfully any such question it is necessary that the witness should produce a copy of any transaction of his with the bankrupt, as contained in any book of the witness's, such copy must be produced.

The clerk will certify this decision to the Register, Edgar Ketchum, Esq.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Debtor filed petition in bankruptcy on May 17, 1869, and was thereupon adjudicated bankrupt. On May 29, 1869, claim was for the first time filed under the laws of New Jersey, in respect to mechanics' liens on certain real estate, factory buildings, and fixed machinery in said State, belonging to bankrupt, the work having been done and materials furnished, whereon the liens were founded, prior to the filing of petition in bankruptcy.

Held, that such liens can be respected and allowed by the Bankruptcy Act only in case they were valid at the time of petition filed in bankruptcy.

Said liens were not made complete and effective under the laws of New Jersey, and were not valued on the 17th of May.

The assignee must distribute the estate without reference to said mechanics' liens as liens.

In re JAMES R. DEY.

BLATCHFORD, J.—This case comes before the court on testimony taken under an order of reference, on a petition presented to the court by the assignee in bankruptcy, asking for a determination as to the claims of certain mortgagees, and as to the validity of certain alleged liens, claimed as mechanics' liens, under the laws of New Jersey, on certain real estate, buildings, and fixed machinery, situated on the Hackensack River, in New Jersey, owned by the bankrupt, and used by him in his business as a manufacturer there of poudrette. There seems, on the evidence, to be no question as to the validity of the mortgage liens as against the assignee in bankruptcy. The only question to be determined is as to the alleged mechanics' liens.

The petition in bankruptcy, which was a voluntary petition by the bankrupt, was filed on the 17th of May, 1869. The earliest claim of lien, in respect to any of the alleged mechanics' liens that was filed under the law of New Jersey, was filed on the 29th of May, 1869. The work was done and the materials were furnished, in respect of which the liens are claimed, prior to the 17th of May, 1869. It is contended on the part of the assignee in bankruptcy, that, under the laws of New Jersey, no lien had attached to the property in question in favor of any one of the claimants of the alleged mechanics' liens, at the time of the commencement of the proceedings in

bankruptcy. The determination of this question involves a construction of the Mechanics' Lien Law of New Jersey, upon the point as to whether the lien given thereby attaches when the work is done and the materials are furnished, or not until the claim of lien is filed. The act in question is one passed on the 11th of March, 1853. (Nixon's Digest, page 484, 2d Ed., page 571, 4th Ed.) The 1st Section of that act declares, that every building shall be liable "for the payment of any debt contracted and owing to any person for labor performed, or materials furnished for the erection and construction thereof, which debt shall be a lien on such building, and on the land whereon it stands, including the lot or curtilage whereon the same is erected." The 5th Section provides, that "every person intending to claim a lien upon any building or lands by virtue of this act, shall, within one year after the labor is performed, or the materials furnished, for which such lien is claimed, file his claim in the office of the clerk of the county where such building is situate," which claim shall contain these matters, specifying four. The same section further provides, that "when such claim shall not be filed in the manner, or within the time aforesaid, or if the bill of particulars," which is one of the four matters, "shall contain any willful or fraudulent misstatement of the matters above directed to be inserted therein, the building or lands shall be free from all lien for the matters in such claim." The 8th Section provides that, "when a claim is filed agreeably to the provisions of this act, upon any lien created thereby, the same may be enforced by suit in the Circuit Court of the county where such building is situated, which suit shall be commenced," and prosecuted in the manner thereafter specified. The 9th Section provides that the declaration in the suit "shall conclude with an averment that said debt is by virtue of the provisions of this act, a lien upon such building and lot, describing the same as in such claim, and that the owner of the land and building "may plead that such house or land are not liable to said debt, and in such case it shall be necessary for the plaintiff, to entitle him to judgment against the house and lands, to prove that the pro-

visions of this act, requisite to constitute such lien, have been complied with." The 12th Section provides that "no debt shall be a lien by virtue of this act, unless a claim is filed as hereinbefore provided, within one year from the furnishing the materials, or performing the labor for which such debt is due." The 13th Section provides "that such land and building may be discharged from any lien created by this act," in four specified ways: (1.) By payment and a receipt therefor, given by the claimant, and filed by the clerk, and an entry made by him in the lien docket opposite the entry of the lien. (2.) By paying to the clerk the amount of the claim. (3.) By the expiration of the time limited for issuing a summons on the lien claim without any summons being issued, or without notice thereof indorsed on said claim. (4.) By showing, by the filing of an affidavit, that the owner gave a notice to the claimant requiring him to commence suit to enforce such lien in thirty days from the service of such notice, and that such time has elapsed without such suit being commenced, or without an entry of the time of issuing such summons being made on such claim. The 14th Section provides that all lien claims for erecting the same building shall be concurrent liens upon the same, and the land whereon the same is erected.

It is impossible to read these provisions of the act, in connection with each other as a systematic whole (and they are all that really bear upon the question raised), without seeing that it is not the intention of the statute that the performing of the labor, or the furnishing of the materials, shall of itself constitute a lien for the debt upon the building or the land. The creating of the debt by such means only gives a right to the creditor to constitute the lien by filing the claim within the time and in the manner specified. If he does not, as the 9th Section declares, comply with the provisions of the act which are made requisite to constitute the lien, there is no lien; and the 12th Section expressly declares that the debt shall not be a lien, that is, shall not become at all a lien, unless the claim is filed in accordance with the 6th Section and within one year from the furnishing of the materials, or the performing of the

labor. It is true that the 11th Section of the act provides that the deed to be given on a sale of a building and lot on a special writ of *fieri facias* on a judgment against such building and lot, shall convey the estate in the lot, which the owner had at, or any time after, the commencement of the building, within one year before the filing of the claim in the clerk's office. But this is merely a provision that when the lien is created or constituted by the due filing of a claim, it becomes a lien by relation, as of the time of the commencement of the building. Until the claim is filed, the lien rests only in *posse*. When such claim is filed, it becomes a lien in *esse*, as of the time when the building was commenced. That there is no lien until the claim is filed is the view held of the statute by the Court of Chancery of New Jersey. In the case of *Morris County Bank* v. *Rockaway Manufacturing Co.*, (1 C. E. Green, 150 and 161), the court (Chancellor Green) held, that a claim not filed according to the requirement of the statute, constituted, under the provisions of the law, no encumbrance on the premises; and that the fact that a judgment at law had been entered upon the lien, when the lien claim had not been filed pursuant to the statute, did not give the debt any priority in payment or advantage over liens upon which judgment had not been rendered. No decision of any court in New Jersey was cited on the argument in conflict with these views.

There was, therefore, no lien in this case in respect to any of the alleged mechanics' liens, at the time the petition in bankruptcy was filed. The filing of such petition, followed by an adjudication of bankruptcy, is made, by Section 38 of the Bankruptcy Act, the commencement of proceedings in bankruptcy under the act. By Section 14 of the act, the assignment to the assignee in bankruptcy relates back to the commencement of the proceedings in bankruptcy. It is claimed on the part of the holders of the alleged mechanics' liens, that although their lein claims were filed after the commencement of the proceedings in bankruptcy, yet, as they were filed within the time granted by the statute of New Jersey, they became, by such filing, liens which must be respected and allowed by this

court. The law is otherwise. Any lien to be recognized by the Bankruptcy Court as a valid lien on property which passes from the bankrupt to the assignee in bankruptcy by virtue of the proceedings in bankruptcy, must be a lien at the time of the commencement of the proceedings in bankruptcy.* The property in question passed under the jurisdiction of this court on the 17th of May, 1869, so as to cast off any liens subsequently sought to be imposed on it, and no proceeding thereafter, under the State law, to impose on it a lien not then created or constituted, was valid. If the subsequent imposition of the lien in this case were to be upheld, it would be difficult to deny on principle the right of a judgment creditor by a judgment recovered before the commencement of the proceedings in bankruptcy, to create, as against the assignee in bankruptcy, a lien on personal property, by issuing or levying an execution thereon after the commencement of such proceedings, but within the time allowed by the law of the State therefor.

It results that the assignee must distribute the estate without reference to the alleged mechanics' liens as liens.

J. H. Strahan, for the assignee.

A. Thompson, for the mortgagees.

J. F. Randolph and *W. H. Peckham*, for the mechanics' lien creditors.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

The stopping of payment of commercial paper, mentioned in Section 39 of the Bankrupt Act, must be fraudulent, and must continue for fourteen days in order to be an act of bankruptcy.

Such suspension or non-resumption is fraudulent (supposing the liability to be undisputed) when it is done purposely and not by accident or mistake.

Semble. Commercial paper in this section means paper, which, by the law

* *In re* Bernstein, 1 N. B. R., 199; *In re* Schneff, 1 N. B. R., 190; *In re* Smith, 1 N. B. R., 599; *Pennington* v. *Sale*, *Id.*, 572; *Jones* v. *Leach*, *Id.*, 595; *In re* Ellis, *Id.*, 555; *In re* Housberger, 2 N. B. R., 92.

governing the contract, has the ordinary qualities and incidents of negotiable paper in the sense of the law merchant.

In re JOHN A. HOLLIS.
In re J. E. KENNEY *et al.*

THESE cases were tried by jury and the substance of the charge has been since put in the form of a written opinion.

LOWELL, J.—By Section 39 of the statute, a banker, merchant, or trader, who has fraudulently stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy. Some difficulty has been found in construing this clause. A fraudulent stopping of payment is not an act heretofore known or defined, and it is not easy of definition. It is easy to see that a merchant or trader will never suffer his negotiable paper to be protested so long as he can provide for its payment; and it is therefore a ready and safe test of insolvency if he stops payment of such paper. Indeed, it is the popular way of expressing the fact of a trader's insolvency, that his paper has "gone to protest." But there is nothing fraudulent in the ordinary sense in such refusal caused by inability. On the contrary, under the Bankrupt Law it is the duty of a trader to stop payment when he finds that he cannot pay every creditor in full. It may be said, with some plausibility, that if a solvent trader stops payment, he commits a fraud on his creditors. But solvent men do not stop payment; or if they do, there is a more convenient and less expensive mode of enforcing their obligations, than by a resort to the Court of Bankruptcy.

Pressed by these considerations, some courts have rejected the word fraudulently altogether. Others have confined its application to the stopping of payment; and they read the statute, that if a merchant fraudulently stops payment, or if, without fraud, he suspends payment and does not resume it for fourteen days, he has become bankrupt. The more natural construction of the statute appears to me to be with those who hold that the word qualifies the whole clause, and that the suspension and non-resumption for fourteen days is explanatory

of the meaning of a stopping of payment; namely, one that shall have lasted for that time.

As to the fraud, a mere oversight, or a *vis major*, or a fraud practiced on the merchant himself, or an honest defense to the particular paper refused, if these reasons or such as these occasion the refusal to pay, would take the case out of the statute. And this would be so, though the word fraudulently were omitted from the law; because such an accident or refusal could not fairly be called a stopping of payment. Still, Congress might well insert the qualification for greater caution. My construction is, that fraudulently means knowingly, and without just excuse applicable to the paper itself.

Probably the fourteen days were given for the very purpose of guarding against accidents and mistakes; and I do not mean to say that when the mistake is discovered it is any longer an excuse. But if it is not found out within the fourteen days, perhaps the petition would be premature, or at any rate ought to be dismissed on payment of the suspended debt.

The differences of opinion which have been expressed by different judges, are, after all, of very little importance. Those judges who give the word "fraudulently" its greatest effect hold that for a solvent trader to suspend payment and not resume it for fourteen days, without some such excuse as I have referred to, is a fraud; and that, for an insolvent trader, who has suspended, not to go into bankruptcy within the same time, is a fraud; and as all traders must be either solvent or insolvent, this in effect makes the voluntary and unexcused suspension and non-resumption to be an act of bankruptcy without any evidence of fraud in the ordinary sense. And, on the other hand, those judges who reject the word, would not hold that every suspension and non-resumption is necessarily an act of bankruptcy; as if it be, for instance, a refusal to pay a note to which the trader believes he has a good defense. So that the practical result of all the decisions is substantially the same, except that in one view, there might be a stopping of payment for less than fourteen days, which would be an act of bankruptcy. But I think it will be some time before any creditor

finds himself able to cover and prove any such fraud. None such has been either defined or proved in any reported case. If there be anything done which can defeat, delay, or hinder creditors, it is provided for in other parts of the section, and such an act would be itself an act of bankruptcy without any stopping of payment. But it must be distinctly averred and proved as a fraud and not as a mere incident of non-payment.

What is commercial paper is not an important question in this case. It has been sometimes said that only such notes or acceptances as the banker, merchant, or trader actually gives in the ordinary and legitimate course of his trade, are in that class. Another opinion is that all paper that, by the law governing the contract, has, in the hands of its actual holders, the qualities and incidents of ordinary negotiable paper in the sense of the law-merchant, is within the definition, whether it was really given by the trader in the usual course of his trade or not. And this is perhaps the better opinion. But the paper here confessedly comes within both definitions.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A deposition by an assignee for value of a *chose in action*, before bankruptcy, is sufficient to entitle him to prove his debt and to be considered the creditor in respect to such debt; and such assignee of a *chose in action*, so proving, may have the right to take any such action or proceedings in the cause in the name of his assignor at his own expense, as he may be advised.

In re James Fortune.

Lowell, J.—One Davenport presented for proof against the bankrupt's estate, an account for goods sold to the bankrupt by one Hovey, which account was duly assigned to Davenport, for value, before the bankruptcy. The deposition of Davenport only was produced. The Register disallowed the proof, and two others offered under like circumstances, and at the request of the parties, certifies to me the question whether they should have been allowed.

The depositions are not sent up; but I understand them to have been sufficient in form, and that they were thought defective in substance because Hovey gave no deposition.

The important powers and rights given to creditors in bankruptcy in relation to the course of proceedings are to be exercised by the real creditors. No doubt could be entertained that the person entitled to vote for assignee, and to examine the debtor, and to oppose or assent to his discharge, is the assignee, for value, of a *chose in action*, and not his assignor. For, though the assignor may be in some sort a trustee by necessity, for the person to whom he has transferred the debt, yet he has the merest technical title, with no real power over the debt in any court.

I suppose the question intended to be submitted is, whether the assignor must not join in the deposition, before such a debt shall be admitted to proof. The English practice has been so, and the reason given for it is, that the assignor should certify whether he has any security. (1 Cooke, B. L. Ch. 6, Section 6 [3d Ed.], p. 182. 1 Griffin and Holmes, B. L., 714.) So in the case of a trustee and *cestui que trust* it is usual for both parties to join. But under our law it seems to me to be sufficient that the true and *bona fide* holder of the debt at the time of the bankruptcy should make the affidavit. Such appearing to be the fair interpretation of the sections upon the subject, and the oath is so full and searching as to include all satisfaction and security held or received by the affiant or by any other person in respect to the debt affirmed to, and there would seem no reason why the assignor should be joined in the case of a debt not negotiable at common law, more than that of one that is negotiable. It is always a question of fact whether the debt has been paid or secured, in whole or in part, and a question as to which pertinent evidence is always admissible. But the *prima facie* case is made out by the affidavit of the real creditor.

As to the matters of form, however, it is proper to say, that perhaps an appeal to the Circuit Court, for the disallowance of such a claim, ought, by analogy, to be the rule of the American

law still prevailing here, to be taken in the name of the original creditor; and it would be right, in all cases, that the fact of the assignment, and its date, etc., should appear in the affidavit and in the record, in order that questions of set-off and security should be met and decided upon a full knowledge of all the facts.

My answer is that a deposition by an assignee for value, before bankruptcy, of a *chose in action*, is sufficient to entitle him to prove his debt, and to be considered the creditor in respect to such debt, to all intents and for all purposes. That his deposition should show the facts and date of the transfer and the name of the original creditor. And that such assignee of a *chose in action*, so proving, should have the right to take any such action or proceedings in the cause in the name of his assignor at his own expense, as he may be advised.

This opinion is to be certified to Mr. Ellis, the Register.

UNITED STATES DISTRICT COURT—OREGON.

A judgment for a fine imposed as a penalty for crime is not a debt within the meaning of the Bankrupt Act, and not being included in the special provisions, allowing certain claims to be proved as debts, it cannot be proved against the estate of a bankrupt.

In re Robert Sutherland.

The State of Oregon proved a debt against the estate of the bankrupt, amounting to thirteen hundred and ninety-four dollars and forty-six cents. Upon the motion of the assignee, the claim was set down for examination before the court.

From the evidence and admissions of the counsel for the State and assignee, it appeared that on December 3d and 4th, 1861, two several judgments were given in the Circuit Court of the State for the county of Multnomah, sentencing the bankrupt to pay two certain fines, and that he be committed until the same be paid. The debt proved before the Register is a part of the sum for which these judgments were given, the remainder having been paid.

DEADY, J.—It is understood from the admission of the counsel that these fines were imposed upon the bankrupt as a punishment prescribed by law for the commission of a crime, of which he had been duly convicted. Indeed, a judgment that a party pay a fine, in the absence of anything to the contrary, must be presumed to have been given as a punishment for the commission of a crime.

The State Act of January 25th, 1854, in force when these judgments were given, provides that "any convict" confined in jail "for the non-payment of a fine," may be discharged from such imprisonment by the commissioners of the county, if he is unable to pay the fine; "but such convict shall not thereby be released from the payment of such fine, but the same may be collected by execution at any future time." Under this act the bankrupt was discharged from imprisonment soon after the judgments were given.

Section 19 of the act declares that all *debts* due and payable from the bankrupt at the time of the adjudication of bankruptcy * * * may be proved against the estate of the bankrupt. Does the term *debt* include a judgment for a fine? Blackstone (Vol. III., 154) says, "the legal acceptation of *debt* is, a sum of money due by certain and express agreement." This, however, is not the popular acceptation of the word. Says the Supreme Court of Massachusetts (3 Met., 526): "The word debt is of large import, including not only debts of record, or judgments, and debts of specialty, but also obligations under simple contracts to a very wide extent; and in its popular sense includes all that is due to a man under any form of obligation or promise." This view of the subject was approved by Justice Story. (2 Story's R., 432.)

To ascertain, then, whether the word debt is here used in the legal or popular sense, recourse must be had to the subject-matter and the context. Immediately following the general clause of Section 19, concerning debts, as above quoted, it is provided that, "All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved or allowed *as* debts, to the

amount of the value of the property so taken or withheld, with interest." The section then proceeds to provide for the case of contingent debts and liabilities, as well as unliquidated damages upon a contract or promise, and then concludes: "No debts other than those above specified shall be proved or allowed against the estate."

From all the provisions of the section, it is apparent that the word debt is used in the legal or limited sense. If it were used in the popular sense, it would not have been necessary to have specially provided that "demands for goods wrongfully taken, etc., may be proved or allowed *as* debts." In the popular sense, such demands are debts, and would have been included in the preceding clause providing for the proving "all debts."

A discharge in bankruptcy releases the bankrupt from all debts which were or might have been proved against his estate: Section 34, Bankrupt Act. These fines were imposed upon the bankrupt as a punishment for crimes of which he was convicted. If provable against his estate, he may be discharged from the payment of them and from arrest made to enforce such payment.

In effect, this would be allowing the National Government, through its courts, to grant pardons for crimes committed against the State. A person convicted of manslaughter and sentenced to pay a fine of a thousand dollars, would be relieved, by a discharge in bankruptcy, from the punishment affixed by law to his crime. I do not think that the act, while it reasonably admits of any other construction, ought to be construed so as to permit or allow such a consequence.

Looking at the letter of the act or the nature of the subject, either separately or conjunctively, it appears to me that a judgment for a fine, imposed as a punishment for a crime, is not a debt provable against the estate of the bankrupt. Abstractly considered, it may be proper that such a judgment should be proved as a debt against the estate, for the purpose of receiving any dividend as a part payment thereof, without effecting a full discharge of the same. Such a provision is found in Sec-

tion 33, concerning debts created by fraud or embezzlement, or by defalcation, while acting as a public officer, or in fiduciary character. But judgments for fines are not included in this special provision, because not enumerated in it.

In *The People* v. *Spalding*, 10 Paige Ch. R., 284, it was decided that a discharge under the Bankrupt Act of 1841 did not discharge a party from a judgment for a fine imposed upon him as a punishment for a contempt committed by violating an injunction. The contempt was merely constructive, and the fine imposed was directed by statute to be ultimately applied in satisfaction of the civil injury to the party who obtained the injunction. The Court of Errors affirmed the decision: 7 Hill, 301. On error to the Supreme Court of the United States, the judgment of the Court of Errors was affirmed: 4 How., 21.

This case seems decisive of the question. Indeed, it goes much further than the court is required to go in this case. The Bankrupt Act of 1841, in the use of the word *debt*, is much less qualified than the present one, yet the court held that it did not include a judgment for a fine. In the case under consideration, the fine was imposed purely as a punishment for the commission of an actual crime; while in the case cited, the fine was imposed nominally as a punishment, but in reality as a compensation to the creditor for the civil injury he sustained by reason of the commission of the acts constituting the contempt.

The claim must be expunged from the list of debts proved against the estate of the bankrupt.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

Bankrupts owed about ten thousand dollars on ten promissory notes given to creditor at one transaction, and subsequently became unable to pay their debts in the ordinary course of business, as men usually do. Creditor having reason to believe this pressed his claim, and (1) Received an account from debtors against a third party to collect and apply on the

indebtedness; (2) Gave another party an order on the debtors for money, part of which they paid, to apply on the indebtedness; (3) Obtained and received goods from the debtors to be applied in like manner; (4) Indorsed the several sums so received, on three of the notes, as of a date different from that on which the indorsement was made and the amounts received, and (5) Failed to surrender the property and money so received to the assignee in bankruptcy. Creditor sought to prove claim in bankruptcy for the balance of the indebtedness.

Held, that proof of debt be disallowed. The creditor received a preference contrary to the provisions of the bankruptcy statute.

An act which the bankruptcy statute declares shall be *prima facie* evidence of fraud, must be deemed to be contrary to its provisions, unless the presumption is repelled by opposing proofs.

Where a creditor has before him what the statute declares shall be *prima facie* evidence of fraud, he must, in law, be deemed to have reasonable cause to believe the existence of such fraud, until the legal presumption is overborne by opposing evidence.

The said payments not having been applied at the time on any or either of the said ten notes, the creditor cannot avoid the effect of accepting the preference by a subsequent indorsement on three of the notes. The preference was made on creditor's debt as an entirety.

In re ANDRIA M. KINGSBURY, WILLIS G. ABBOTT, AND PHILIP A. HALE.

HALL, D. J.—The assignee in this case having opposed the allowance of the claim sought to be proved by Nehemiah C. Rider, a creditor of said bankrupt, the proofs already taken in regard to such claim, were referred to Wm. H. Comstock, one of the Registers in bankruptcy, with directions to take further proofs, and to report his opinion upon all the evidence in respect to such claim.

The Register having taken the proofs offered by the parties litigant made his report, stating that he had heard and read all the proofs, and found as matter of fact:

First. That N. C. Rider now holds, and has continued to hold, since the spring of 1866, ten notes, made and given by these debtors to him at one and the same time, growing out of one and the same transaction, to wit: The sale by him to them of his interest in their copartnership concern, which notes amount to about ten thousand dollars.

Second. That during the latter part of January, 1868, said Rider obtained and received from the debtors, their account of nine hundred and ninety-six dollars and nineteen cents, against one Winston, of Syracuse, to collect and apply on this indebted-

ness; that he settled this account and took Winston's note, dated January 22d, 1868; that at about this time he gave Porter T. Swan an order on these debtors for about sixteen hundred dollars; that they paid nine hundred dollars upon said order, to apply on this indebtedness; that on the last days of January, or first days of February, 1868, he obtained and received goods from these debtors valued at four hundred and twenty dollars, to apply on this indebtedness.

Third. That said Rider indorsed these several sums so obtained and received from these debtors, as payments on three of said notes, and dated each of the indorsements January 15, 1868; that the actual time of making the indorsements was not on the 15th day of January, 1868; that they were all made at one and the same time, and not until after the said goods were received.

Fourth. That during this time said Rider was at the office of these debtors, and talked with Mr. Hale (one of these debtors), and Mr. W. W. Smith, their confidential clerk, about their business affairs, and learned that these debtors were unable to pay their debts as fast as they became due, and offered to find a man to buy their retail store, if they would turn out the avails thereof to him on this indebtedness.

Fifth. That about the same time he received said goods, to apply on this indebtedness, he commenced a suit in the Supreme Court of the State of New York against these debtors for the balance of this claim.

Sixth. That said Rider has not surrendered the property, money, and goods so obtained and received of said debtors, to the assignee in this matter.

Having found and reported these facts, the Register also reported his opinion, "that said N. C. Rider, in obtaining and receiving the said account, money, and goods, thereby accepted a preference, having reasonable cause to believe that the same was given by those debtors contrary to the provisions of the Bankrupt Act; and he, not having surrendered to the assignee the property, money, and benefits received by him under this preference, is not entitled to receive any dividend."

No exceptions to this report have been filed by the creditor, but as the questions presented have been argued upon the merits, I have read the testimony, and considered the questions of fact and law presented.

The conclusions of fact stated by the Register appear to be sustained by the evidence, and there is no doubt but that Rider obtained and received a preference, in the manner stated, having not only reasonable, but most abundant cause to believe that the bankrupts were then insolvent, and that, in giving such preference, they were acting with a knowledge of their insolvency.

The sections of the Bankrupt Act which bears directly upon the questions now presented, are the 23d, the 29th, the 35th, and the 39th.

The 23d Section, among other things, provides in substance, that any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom, until he shall first have surrendered to the assignee all property, money, benefit, or advantages received by him under such preference.

The 29th Section provides, among other things, that no discharge shall be granted to a bankrupt who has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, transfer, conveyance, or assignment of any part of his property.

The 35th Section, among other things, provides that if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or condition-

ally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance, is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited; and if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property, to any person who then had reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance, is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance, shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt; and if such sale, assignment, transfer, or conveyance, is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud.

The 39th Section provides in substance (among other things), that it shall be an act of bankruptcy if any one, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, sale, conveyance, or transfer of money or other property, rights, or credits, with intent to give a preference to one or more of his creditors, or with the intent, by such disposition of his property, to defeat or delay the operation of the Bankrupt Act; and that if such person shall be adjudged a bankrupt, the assignee may recover back such money, property, etc., provided the person receiving such payment, etc., had reasonable cause to believe that a fraud on this act was intended, and that the debtor was insolvent; and such

creditor shall not be allowed to prove his debt in bankruptcy.

Under the proofs in this case, it is clear that the debtors, at the time Rider received a preference as stated, were entirely unable to pay their debts in the ordinary course of business, as men in trade usually do; and that this was well-known to Rider. Such inability was insolvency, within the meaning of that term, as used in the Bankrupt Act.*

Indeed, it is certain that the bankrupts must then have been so deeply insolvent that they could not, upon a final winding up and settlement of their affairs, within any reasonable time, and under the most favorable circumstances, have paid their debts in full, and Rider had sufficient cause to put him upon inquiry, even if he had not sufficient cause to believe that such was their condition.

Under such circumstances, it would require strong proof to repel the legal presumption that the payments made by the turning out of an account for nearly one thousand dollars—the payment through the order in favor of Swan of about nine hundred dollars in goods, on the order, and the payment of four hundred and twenty dollars to be applied on the order—not to Swan, but to Rider, who drew it—and which necessarily and obviously had the effect of giving a preference to Rider, were not intended to have that effect. No such proof has been given, and it must be held that such intention existed.

This preference was accepted by Rider, and under the 23d Section of the Bankrupt Act his debt cannot be proved if he had reason to believe that such preference was given contrary to any provision of that act; and it can hardly be doubted that such preference must be held contrary to some of the provisions of the 29th, 35th, and 39th Sections. The sale and transfer of the property, especially of the account of nine hundred and ninety-six dollars and nineteen cents, was not in the ordinary course of business, and therefore *prima facie* fraudulent under

* *Thompson* v. *Thompson*, 4 Cushing, 127; *Lee* v. *Kilbourne*, 3 Gray, 594; *Spratt* v. *Hobhouse*, 4 Bingham, 178; 2 Kent's Com's, 389; *Merchant's National Bank* v. *Truax*, 1 N. B. R., 545. *In re* Black, *Id.*, 353.

the provisions of the 35th Section of the Bankrupt Act, and therefore necessarily contrary to its provisions.

But the general scope and purpose, and general provisions of the Bankrupt Act as the foundation of a system of bankruptcy, should be considered in determining whether any act of a debtor or creditor is contrary to the provisions of the Bankrupt Law.

The policy and purpose of bankrupt laws are to compel an equal distribution of the assets of the bankrupt among all his creditors. Hence, when he has shown his inability to meet his engagements, one creditor cannot, by collusion with him, or by a race of diligence, obtain a preference to the injury of others. Such conduct is a fraud upon the act, which is intended to secure an equal or *pro rata* division of his assets.* To sustain preferences accepted by a favored creditor, with a knowledge that his debtor was deeply and hopelessly insolvent, would defeat the most important objects of the Bankrupt Act, and essentially aid insolvent debtors and their relatives and particular favorites in the continued perpetration of the gross wrongs and grosser frauds which have been heretofore allowed under State laws, sustaining voluntary assignments, with such preferences as the insolvent might deem it for his interest, or the interest of those he wished to favor, to make.

Independent of the provisions of the 35th Section of the Bankrupt Act, which declares that a sale or transfer, not in the ordinary course of business, shall be *prima facie* evidence of fraud, the proofs in this case would justify the rejection of the claim of Rider; but aside from this, it is very clear that an act which the Bankrupt Act declares shall be *prima facie* evidence of fraud must (unless the presumption of fraud be effectually repelled by opposing proofs) be deemed contrary to its provisions. And a creditor who has before him what the Bankrupt Act declares shall be *prima facie* evidence of fraud, must in law be deemed to have reasonable (as he certainly has legal)

* *Shawhan* v. *Wherritt*, 7 Howard, 627–644; *Ogden* v. *Jackson*, 1 Johnson, 373.

cause to believe in the existence of such fraud, until this legal presumption is overborne by opposing evidence.

It was insisted that the preference accepted by Rider should only affect the proof of his claim for the small balance due upon the notes on which the payments, etc., were afterwards indorsed; but the proof shows that the payments, etc., were not at the time applied upon any or either of the ten notes held by Rider, but were applicable as much to any one as to any other of them; and that the indorsements were not, in fact, made until some time afterwards. In fact, the preference was given generally upon Rider's debt as an entirety; and to permit him to avoid the effect of the acceptance of such preference by a subsequent application and indorsement of the amount of such preference upon particular notes, nearly paying the same in full, would justify an evasion of the law and a defeat of its provisions, which could be made available in most cases by a shrewd creditor and his accommodating insolvent debtor.

The report of the referee is confirmed, and the proof of the debt of Rider is disallowed and rejected with costs.

Geo. Gorman, for assignee.

N. B. Smith, for Rider.

UNITED STATES DISTRICT COURT—WEST VIRGINIA.

A State has, in her sovereign capacity, a lien on all her realty for taxes. Such lien has priority over any claim of one of her citizens, no matter when such claim may have been acquired.

A creditor, ignorant of his legal rights, will not be held, in the absence of proof of fraud, to intend what his acts imply, particularly if such creditor be acting in a fiduciary capacity.

In re BRAND.

JACKSON, J.—In this case the Register certifies that the petition was filed on the 28th day of August, 1867, and that on the following day the petitioner was duly adjudged a bankrupt. At the first meeting of creditors, which took place on the 28th day of September, ensuing, among other debts filed with the

Register against the bankrupt were debts due Peter Banackman, James Way, executor of Gideon Way, deceased, and the State of West Virginia. The Register further certifies that they were proved in the usual form under the 22d Section of the act. On the 5th day of March, 1868, one John Kinkaid filed his affidavit, setting forth that he was the holder of a single bill for one thousand dollars, executed by the bankrupt and secured by deed of trust on his estate, claiming a lien by virtue of said trust, and insisting on his rights under the same. Upon the foregoing facts four questions arise, three of which are certified by the Register for decision.

First. Can the Register direct the payment of "debts due the State," and "all taxes and assessments made under the laws of such State," to the prejudice of a creditor who has a prior lien?

It is a well-settled principle that the assignee of a bankrupt takes his estate subject to all the liens against the same, as well as all the equities existing against it. The assignee merely succeeds to the rights of the bankrupt, and is affected by all limitations imposed by law against the bankrupt's estate antecedent to his accepting the trust. Courts in bankruptcy invariably respect "*bona fide*" liens obtained against a bankrupt anterior to his adjudication as a bankrupt, if not within the prescribed period.

By the 20th Section of this act liens are expressly provided for. They are usually created in this country by the force and operation of statutes, enacted in the several States thereof. In this State liens are created by statute in the form of trust deeds, judgments, and attachments. If, therefore, the debts filed before the Register are, as it is claimed, liens upon the bankrupt's estate, and the parties in interest have not abandoned or waived their rights under their liens, they must be discharged according to their priorities, unless one of the liens should be for taxes due the State. She has, in her sovereign capacity, a prior lien on all of her realty for taxes, and an undoubted right to enforce their collection to the prejudice of any claim due one of her citizens, although such a lien may be acquired subsequent

to that of a judgment or trust creditor. If her lien, however, be for a debt other than taxes, she is not entitled to any preference over other creditors of the same class. I am not aware of any statute that gives her special rights and privileges over the general creditors by reason of the fact that she is the State. The character of the debt due the State does not appear from the certificate of the Register. If, however, it is a lien upon the bankrupt's estate (and is not for taxes), the Register will treat it as other liens, to be preferred according to its date, and must be discharged before there is a general distribution of the assets. But should it prove to be merely a debt due the State without a lien having been acquired, then, after the specific liens are discharged, the Register will direct the payment of such debts as are of the preferred debts, Class 3, under Section 28, out of the general assets.

Second. As to the lien set up by Banackman, I concur in the conclusion of the Register, that it was destroyed. It was acquired under process of attachment, and before judgment was had the debtor filed his petition in bankruptcy within four months after the suing out and levying of said attachment, thereby dissolving the attachment under the provisions of the 14th Section. This action upon the part of the debtor necessarily compels the attaching creditor to resort to his only other remedy, that of proving his claims as a general creditor, which he wisely did at the first meeting of the creditors.

Third. Did Way's executor waive his lien in appearing before the Register and filing proof of a debt against the bankrupt, alleging that it was secured by deed of trust upon his estate? Supposing the lien not to be waived, the principles already stated would govern the question presented, and the debt would be discharged accordingly. It is contended, however, that the executor proved his debt in the ordinary way, and must be held to have waived and abandoned his rights under the lien. It cannot be denied that such action upon the part of the executor tended to that result, and that the Register might reasonably reach such a conclusion. I think, however, upon a careful examination of the 20th Section of the act, one

important thing essential to the waiver and abandonment of a lien has been omitted in this instance. One of its provisions requires a creditor who holds a lien either to release or convey his claim to the assignee before he can be admitted to prove his whole debt. No such release or conveyance was made. The affidavit filed before the Register states the fact that the debt "was secured by deed of trust." At its filing the Register should have called the attention of the creditor to the fact that he held a security for his claim, and inform him that before he could prove his whole debt as a general creditor he must surrender his security to the assignee. It appears that he did inform him "that proof of his claim would place it upon the footing of a common creditor," but failed to notify him that a creditor holding a security cannot prove his debt without accompanying it with a release or conveyance of such claim to the assignee. If the creditor had been fully advised of his rights, he would have discovered that he could resort to one of three remedies; he could elect either to rely upon his security, or abandon it, and prove the whole debt, or be admitted as a creditor only for the balance. No such election was made, but the Register permitted him to file his proof without releasing or conveying his claim to the assignee upon the property held as security until such release or conveyance was filed; no proof of the debt as a general creditor should have been received. Any attempt upon the part of a creditor to prove a debt before a register without complying with the conditions imposed by law, should be disregarded by him. In this instance it is apparent that the party was ignorant not only of what the law required, but also of his legal rights in the premises. It is also manifest that no fraud was intended, as he voluntarily disclosed his security: otherwise, fraud would have been presumed, and the security forfeited. It is competent, however, to explain such a presumption and remove the taint, and under such circumstances a court of bankruptcy, in the exercise of its discretionary power, would permit a creditor to withdraw the proof of his claim before the Register, and rely upon his security. The action of the creditor in this case presents the naked question, whether,

being ignorant of his legal rights, he shall be held to intend what his acts would seem to imply? I think not. It is manifest from his affidavit that his object was to give the assignee notice of his claim, and it evidently did not occur to him that in doing so he would waive any legal right. His action merely showed a want of familiarity with the provisions of the law. This fact should not operate to his prejudice, when we know that much diversity of opinion exists in the courts as to the true construction of some of its most important provisions. For the reasons assigned, I am not disposed to require a creditor, who inadvertently or ignorantly proves his debt, unaccompanied with fraud, to surrender his lien and participate in the general distribution of assets, but feel inclined to permit a creditor, under such circumstances, if he elect to do so, to withdraw the proof of his debt and rely upon his security. In the case of *ex parte* Howard (Crabbe, 496), the court recognize this principle, and affirm that "a creditor holding collateral security proved his debt, but afterwards showing that he was ignorant that the proving of the debt debarred him of his security," he was allowed to withdraw the proof. The case of *Stewart* v. *Siegfried Isidor et al.*, 1 N. B. R., 485, cited to sustain the ruling of the Register on the point, is not in conflict with the principle just announced. In that case there was a strong presumption of fraud, founded upon the fact that the creditor proved his claim and failed to disclose his security. The case turned upon this point, the court holding that "a secured creditor who proves his claim without referring to the security forfeits the security." Had the creditor in that instance disclosed his security, it is manifest that the court would have remitted him to his rights under it, unless he waived it. Another consideration to some extent influences me in reaching my conclusions. This creditor is acting in a fiduciary capacity, being the legal representative of an estate; I am not, therefore, disposed to sanction acts of his which might tend to the manifest injury of the estate, unless they are too plain to admit of doubt. For the reasons assigned, I cannot concur with the ruling of the Register on this point.

Fourth. Some of the reasons just assigned apply with equal force to the claim of Kincaid, and sustain the Register in refusing to treat his affidavit as "proof of debt, and as an abandonment of his lien." The affidavit in general terms describes the debt, sets up the lien, and affirms that the creditor "still claims and insists" upon his security. It is apparent from the affidavit that Kincaid did not intend to prove his claim, but merely to notify the assignee of his rights, and that he should rely upon his lien for protection. I concur with the Register in his ruling of this point.

I am, therefore, of the opinion, 1st, that the lien of the State for taxes is paramount to all others, and should be first paid; 2d, that the lien of Banackman, being under mesne process, was destroyed in this instance, by the act of the debtor in suing out his petition in bankruptcy within four months after the suing out and levying the process of attachment; 3d, that under the state of facts in this case, neither Way's executor, nor Kincaid's, will be held to have abandoned their liens. But the Register will require them to make their election as between proof of claim and participation in the general assets, or a resort to their securities; in which event they are permitted to withdraw their claims and assert their rights under their securities.

UNITED STATES DISTRICT COURT—OREGON.

The prohibition of "further proceedings," is intended of proceedings upon the petition and against the debtor, and not of collateral proceedings by or against third persons, or even the debtor.

Injunctions in bankruptcy, under Section 40 of the act, may be allowed and issued without notice, but the court may require notice to be given.

In re Muller and Brentano.

STATEMENT.

On December 7, 1868, a petition was filed in this court by a creditor of the above-named M. and B., praying that they be adjudged bankrupts.

The claim is stated to be for goods sold and delivered to the alleged bankrupts "within the last two years past," of the value of three thousand nine hundred and seven dollars.

Three acts of bankruptcy are charged:

First. That said M. and B., being traders under the firm-name of Muller & Brentano, and being bankrupt, etc., on November 7, 1868, sold, transferred, etc., their merchandise, accounts, and assets to Baum & Wolgennant, with intent to defeat, etc., the operation of the Bankrupt Act.

Second. That said M. and B., on the date aforesaid, made the transfer aforesaid to B. and W., with intent to delay, defraud, and hinder their creditors; and

Third. That said M. and B., on November 10, 1868, paid John Anderson, one of their creditors, with intent to give a preference to such Anderson, and thereby defeat and delay the operation of the Bankrupt Act.

The proof of debt is made by the petitioning creditor, Benjamin Price, and states that the debt was due on and before November 23, 1868.

The proof of the acts of bankruptcy is made by the attorney in fact of the petitioner (who resides in San Francisco), William J. Hyland.

It states that on or about November 7, 1868, M. and B. had in store at Jacksonville, Oregon, merchandise of the value of thirty-five thousand dollars, and that, at the same time, there was due them, from solvent persons in the vicinity of Jacksonville, debts of the value of twelve thousand dollars; and that, on said last-mentioned date, said M. and B., with the intent and purpose alleged in the petition, fraudulently sold and transferred all their stock in trade and things in action, to B. and W. aforesaid.

That said B. and W. were cousins of M. and B., and the latter was their clerk, and without means save a small sum due him from M. and B. for services as clerk; and that the means of Baum were not at all adequate or sufficient to make the purchase aforesaid.

That such sale and transfer was without consideration, except

the small sum due Wolgennant, and that said B. and W. conspired with M. and B., by means of such pretended and fraudulent sale and transfer, to defraud the creditors of said M. and B., and defeat the operation of the Bankrupt Act.

That said B. and W. are wholly irresponsible; that they are disposing of such merchandise below its value, and at auction, and are collecting the debts due M. and B., and, if not prevented, will dispose of said property so that the creditors of said M. and B. will receive no benefit therefrom.

That M. and B. are indebted to persons in San Francisco to the amount of about thirty-five thousand dollars, and to other persons in the State of Oregon a further large sum, to affiant unknown.

That these parties all reside in Jacksonville, within a day's journey of California, and that if B. and W. are suffered to remain in possession of the property it will be disposed of and the parties will leave the State and go beyond the jurisdiction of the court with the proceeds; and that said M. and B. are about to depart from the State, and will do so unless prevented by the order and warrant of this court.

On December 9, on the application of counsel for the petitioning creditor, an order to show cause (Form No. 57) was allowed; and also an order directing the issuance of a writ of injunction forbidding M. and B. and B. and M. from interfering with or disposing of the property and accounts of the alleged bankrupts, and of a warrant commanding the marshal to take possession of such property and keep the same until the further order of the court.

On December 29, B. and W., by their attorney, filed a motion to dissolve the injunction and to discharge the property from the warrant. The motion is made upon the papers already mentioned in the case and the affidavit of O. Jacobs, of Jacksonville.

The affiant states that he knows the parties, and that the injunction and warrant herein were served about December 15, 1868. That the goods and merchandise formerly belonging to M. and B. were, at the service of said injunction, in the exclu-

sive possession of B. and W. as purchasers from said M. and B., and had been in such exclusive possession since November 7, 1868; and that said goods and merchandise were taken from the possession of B. and W. by the messenger, under the warrant aforesaid, and that they are of the value of about twenty-five thousand dollars.

DEADY, J.—The grounds of the motion are set forth therein as follows:

First. There was no authority for the marshal or messenger to seize property in the hands of these parties.

Second. The writ of injunction and order to take possession were issued without notice.

Third. The order to take possession of goods was not made under any law of the United States.

Fourth. The notice to show cause was and is returnable in January, 1868, a date prior to the act of bankruptcy complained of.

Fifth. The petition fails to show at what time the act of bankruptcy was committed.

Sixth. The charge of bankruptcy is made upon information and belief, there being no positive charge.

Seventh. The proof of indebtedness does not show that the debt of petitioning creditor existed at the time the alleged act of bankruptcy was committed.

Counsel for the petitioning creditor objects to the hearing of this motion at this time, because, the order to show cause not being returned, there is no proof before the court that it has been served upon the debtors.

In support of this objection he cites the last clause of Section 40 of the act. I do not think the clause supports the conclusion.

The prohibition of "further proceedings" is intended of proceedings upon the petition and against the debtor, and not of collateral proceedings by or against third persons or even the debtor.

The only evidence before the court as to the service of the injunction or the execution of the warrant, is contained in the

affidavit of Jacobs. Neither of these writs has been returned. The order to show cause is not returnable until January 7. The order allowing the warrant to take possession to issue, speaks of the goods and effects of the alleged bankrupts, and not of those of B. and W. The warrant, I presume, conforms to the order in this respect. I must also presume that the messenger has obeyed the warrant, and taken into his possession the goods and effects of M. and B., in whosesoever hands he found them, and not otherwise. If, by mistake or otherwise, he took the goods of another, he is liable to the party injured, upon his official bond. This is no more than the responsibility which the common law devolved upon every officer to whom an execution against property was directed. He had to determine, at his peril, what was the property of the defendant in the writ, and what was not.

Under Section 40 of the act the messenger, under the direction of the warrant, is "to take possession, provisionally, of *all the property* and effects of the debtor." And it makes no difference in whose hands he may find them. This is a question of fact for the officer to determine for himself, subject to his responsibility. Taking the affidavit of Jacobs, it appears that this property was in the possession of B. and W. when seized by the messenger, but it does not follow that it was not, at the same time, the property of M. and B. This question cannot be made or decided upon this motion. Certainly, upon the statements in the petition and accompanying proofs, it was not the property of B. and W., and the affidavit of Jacobs, considering what B. and W. are called upon to show, rather confirms this conclusion than otherwise. The first ground of the motion is thus disposed of.

The second ground is well founded in fact, but immaterial in law. Injunctions in bankruptcy, at least when issued in the primary stage of the proceedings, under Section 40 of the act, may be allowed and issued without notice. The provision in the Judiciary Act of 1793 (Bright.'s Dig., 256), forbidding the writ to be granted *in a suit in equity*, without notice to the adverse party, does not apply to proceedings in the District

Court under the Bankrupt Act. (Bright.'s Dig., 465; 6 Int. Rev. Rec., 199; American Law Review, Oct., 1868, p. 174.) The last citation is to *the matter of Wallace*, decided in this court, upon able argument and careful consideration. Upon further argument, the conclusion seems to be sound in principle and upon authority. The rule in the Judiciary Act requiring notice in all cases of injunction is an anomalous one, and if applied to the summary proceedings under the Bankrupt Act would, in most instances, render it nugatory. Notice to B. and W. of the application for the injunction in this case would have been notice to them to leave the jurisdiction with the property or its proceeds, which they could have done if so disposed. Doubtless the court may require notice to be given to the adverse party, and even that the applicant shall give security for damages, whenever it thinks the ends of justice or the security of parties require it.

Possession of the goods was not taken under the order but the warrant which was issued pursuant to the order. To authorize the allowance of this order, or the issuance of this warrant, notice to the adverse party was not necessary. On the argument nothing was shown in support of this objection, neither can there be.

In support of the third ground of the motion, counsel shows that the order allowing the issuance of the warrant excepts from its operation such "goods as are exempt from the operation of the act of Congress entitled 'An Act to establish an uniform system of bankruptcy throughout the United States,' approved March 2, 1868." There being no bankrupt act of this date, the conclusion is, that the order for the warrant to take possession was not made under any law of the United States. This is an extremely technical objection, and admits of a sufficient and equally technical answer. The order for the warrant does not profess to be made under the act of March 2, 1868, but it only excepts from the operation of such warrant the goods exempt by that act. There being no bankrupt act of such date, the exemption is nugatory, and the warrant to take possession is without qualification in this respect. But

the recital of the title of the Bankrupt Act in any proceeding is mere matter of form. The recital in this order gives the date of the act incorrectly—1868 for 1867. But this immaterial mistake can in no way affect the legality of the order. The order would have been sufficient without stating the title or date of the act. The court takes judicial notice of the acts of Congress, and they need not be set forth or specially referred to in any proceeding before it.

In support of this ground of the motion, it is also urged that the act (Sec. 40) does not authorize the issue of the warrant against the goods of the alleged bankrupt alone, but that the warrant cannot issue unless it be against his person, and also "to take possession provisionally of all the property and effects of the debtor" as well.

This construction of the act does not seem to me to be warranted by the language or object of the section. If the showing be such as Section 40 requires, the warrant may issue against the person and goods, or either of them. The greater includes the less, and neither the alleged bankrupts nor B. and W. can or ought to be heard to complain that the petitioning creditor has been satisfied to take process against the goods only, because he was entitled to it against the person also.

If, in fact, the order and warrant had been for the arrest of both the person and goods, the latter might have been executed against both or either, as the petitioning creditor might direct.

The fourth ground of the motion is based upon the assertion therein, that the order to the debtor to show cause is by mistake made returnable in January, 1868, instead of 1869. The order has not yet been returned, and there is no evidence before the court that it is returnable at an impossible date. Nor is it apparent, if it be admitted that the order is erroneous in this respect, how the fact can in any way affect the merits of this motion. The jurisdiction of the court to enjoin B. & W. from interfering with the goods of the debtor, or to issue a warrant to take provisional possession of them, is not dependent upon the service on the alleged bankrupts of a proper order to show cause.

As to the fifth ground of the motion, the petition avers that the several acts of bankruptcy complained of were committed "within six calendar months next preceding the date of the petition," and on or about a certain day in November, 1868. This is sufficient; and if it were not, to show the actual day, it certainly is to show that they were committed within six months before filing the petition, and that therefore this court had jurisdiction to adjudge M. and B. bankrupts on account of them. Whether the particular day within these six months is stated or not does not matter so far as this motion is concerned. When the alleged bankrupts appear to make defense to this petition, the question can be made as to whether the particular day is sufficiently stated, and not otherwise or before.

As to the sixth ground of the motion, it is not well founded in fact. The charge of bankruptcy is *not* made upon information and belief. The allegation in the petition is positive and unqualified as to the transfer of the stock of merchandise and book accounts to B. and W., and also the payment to Anderson, with intent to prefer him. The same is true of the deposition to the acts of bankruptcy. True, the petition states that, in addition to the merchandise and accounts, there was transferred "all the available assets" of M. and B., and this averment as to the assets is upon information and belief. This averment is a mere make-weight, and it is perfectly immaterial whether it is in the petition or not. The allegations as to the transfer of the merchandise and accounts and of the payment with intent to give a preference are all or either of them sufficient allegations of acts of bankruptcy. Nor is there anything in the act, or the orders and forms, or the nature of the proceeding, which requires that the allegations in the petition, either as to the debt or the acts of bankruptcy, should be made upon the personal knowledge of the petitioner. The petition must be made by the creditor, and in most instances can be made upon information and belief alone. In addition to the petition there must be a deposition to the debt and the act of bankruptcy. In these it may be proper that the witness should speak from his own knowledge, or at least disclose the

grounds of his belief, or the sources of his information. Much will depend upon the circumstances of the particular case.

By the seventh ground of the motion, it is asserted that the debt of the petitioning creditor was not in existence when the acts of bankruptcy complained of were committed.

Under the English Bankrupt Act it was held that a commission ought not to be granted on the petition of a creditor whose debt was not in existence when the act of bankruptcy was committed. (1 Bac. Ab., 558.) This statute (6 Geo. IV., C. 16, Section 12) allowed the commission to issue upon the petition of *any* creditor or creditors of the alleged bankrupt. (1 Bac. Ab., 552.) The act of March 2, 1867, allows any creditor, whose debt is of sufficient amount, and *provable under the act*, to maintain the petition to have his debtor adjudged a bankrupt. (Section 29.) A debt contracted after the act of bankruptcy is provable under the act. (Section 19.) The letter of the English and American statutes is not materially different in this respect. Taken literally, they both would permit a petition to be maintained by a creditor whose debt arose after the commission of the act of bankruptcy complained of. The American statute ought, I think, to be construed as the English one, so as not to permit a petition to be maintained by a creditor whose debt was contracted after the act of bankruptcy happened. This is in accordance with the decision of this court in Burk's case, that a creditor should not be heard to object to the discharge of a voluntary bankrupt for matters which occurred before he became such creditor. The construction is supported by the familiar principle that no one ought to be allowed to complain of that which does not injure him. In case the act of bankruptcy was secret, and unknown to the creditor at the time of contracting his debt, the rule might not apply.

The proof of debt in this case, and the petition, substantially shows that M. and B., on November 23, 1868, and before, were indebted to the petitioner in the sum of near four thousand dollars. The petition was verified on the last-mentioned date, and the acts were committed some days before in the same month. The indebtedness arose upon the sale and delivery of

goods prior to and within two years of the date of the petition, to be paid for upon request. The allegations of the petition are framed upon the idea that the debt did not become due until payment was requested, and that the commencement of this proceeding was a request. This is probably a correct conclusion in the premises. But the question is not when the debt became due and payable, but when did it commence to exist? It commenced with the delivery of the goods, or any portion of them equal in value to the sum of two hundred and fifty dollars. The proof and petition were made in San Francisco, and they are very slovenly and unskillfully prepared in this respect as well as some others. But I think it a fair inference from the facts stated, and the nature of the transaction, that the debt of the petitioner, or at least two hundred and fifty dollars of it, *existed* before November 7, 1868, the date of the first acts of bankruptcy.

This disposes of the motion. It is disallowed. I have considered this motion as if Baum and Wolgennant were entitled to make these objections. But as to the fourth, fifth, sixth, and seventh grounds of the motion, I do not think they have any right to be heard. The questions raised on these points are between the petitioning creditor and the alleged bankrupts, and not B. and W. In the course of the argument, counsel for B. and W. have insisted that this is a special proceeding, purely statutory, and that the act must be taken most strictly against the creditor, and in favor of the bankrupt. In my judgment, this view of the matter is not supported by reason or authority. The act does not attempt to punish the bankrupt, but to distribute his property fairly and impartially between his creditors, to whom in justice it belongs. It is *remedial*, and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew. The power to pass bankrupt laws is one of the express grants of power to the National Government; and history teaches that the want of a uniform law on this subject

throughout the States, was one of the prominent causes which led to the assembling of the Constitutional Convention, and consequent formation and adoption of the Federal Constitution.

Such a statute is not to be construed strictly, as if it were an obscure or special penal enactment, and this was the sixteenth, instead of the nineteenth century. The act establishes a *system*, and regulates in all their details the relative rights and duties of debtor and creditor. Such an act must be construed—as indeed should all acts—" according to the fair import of its terms, with a view *to effect its objects and to promote justice.*"—

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

A debtor having property in New York was arrested on mesne process of State Court, upon a debt of over one hundred dollars, founded on contract, and was released from close custody on bail, but process was not discharged within seven days.

Held, said debtor had not in respect of the premises committed an act of bankruptcy under the provisions of Section 39 of the Bankruptcy Act, he not having been actually imprisoned for more than seven days on said order of arrest.

Proof of the mere stoppage and non-payment of commercial paper for fourteen days, does not, of itself, establish an act of bankruptcy. Creditors must show that such stoppage or suspension was fraudulent.

In re JOHN DAVIS.

BLATCHFORD, J.—The issues raised by the denial of bankruptcy in this case have been tried before the court, without a jury.

The first act of bankruptcy alleged in the petition, which was sworn to on the 17th of September, 1869, and filed on the 20th of September, 1869, is, that the debtor " has been arrested and held in custody, under and by virtue of mesne process, issued out of the Superior Court of the city of New York, in the State of New York, within which the debtor has property, founded upon a demand in its nature favorable against the bankrupt's estate, under said act, and for a sum exceeding one hundred dollars, and that such process is remaining in force

and not discharged by payment or in any other manner provided by the laws of such State applicable thereto, for a period of seven days." The proof shows that the debtor was, on the 24th of August, 1869, at the city of New York, in which city he then resided, arrested and held in custody by the sheriff of the city and county of New York, under an order of arrest issued out of the Superior Court of the city of New York; that the debtor, on his arrest, immediately gave bail, and was not lodged in jail, and was discharged from close custody by the sheriff; that the order of arrest was issued in a civil action founded on a promissory note for a sum exceeding one hundred dollars, made by the debtor, and which was and is in its nature provable against the bankrupt's estate under the Bankruptcy Act; and that the said order of arrest, at the time of making oath to said petition, still remained in force, and had not been discharged by payment, or in any other manner provided by the law of the State of New York applicable thereto.

The 39th Section of the Bankruptcy Act specifies, as an act of bankruptcy, that the debtor "has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of any State, District, or Territory, within which such debtor resides, or has property, founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of such State, District, or Territory applicable thereto, for a period of seven days." The same section, in the clause immediately following the one just cited, specifies as an act of bankruptcy, that the debtor "has been actually imprisoned for more than seven days, in a civil action founded on contract, for the sum of one hundred dollars or upward." The order of arrest in this case was issued in a civil action, founded on contract, for a sum exceeding one hundred dollars. It was mesne process issued out of a court of the State in which the debtor resided, and was founded on a demand in its nature provable against a bankrupt's estate under the act, and such

process remained in force, and, when the petition was filed, not discharged by payment or in any other manner provided by the law of such State applicable thereto. The debtor was arrested under the process, and immediately gave bail, and was not lodged in jail, and was discharged from close custody. Assuming that he was held in custody for a period of seven days under the process, he was not actually imprisoned on it for more than seven days. His case, therefore, does not fall within the second clause cited, although it may fall within the first clause. The question to be determined is, whether, under those circumstances, he can be adjudged a bankrupt. I think not. The statute evidently intended to draw a distinction between being actually imprisoned for more than seven days, and being held in custody for a period of seven days. It confined the former to a civil action founded on contract, while it extended the latter to an action founded on any demand in its nature provable against a bankrupt's estate. Not only are claims founded on contract provable in bankruptcy, but, by Section 19, all demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, are provable as debts to the amount of the value of the property so taken or withheld, with interest. Such demands are not claims founded on contract. They are, therefore, claims or demands which would fall within the first clause and not within the second clause. The first clause has, therefore, a field for operation over which the second clause does not extend. This being so, and there being a distinction evidently intended by the statute between actual imprisonment and mere arresting and holding in custody, a person actually imprisoned being held in custody, although a person held in custody is not necessarily actually imprisoned, full effect must be given to the second clause. This cannot be done if it be held that a person arrested in a civil action founded on contract may be adjudged a bankrupt, although he has not been actually imprisoned for more than seven days. If it be so held, on the ground that a claim founded on contract is a demand in its nature provable against a bankrupt's estate under the act, and

that it is sufficient, under the first clause, that the debtor be arrested and held in custody, under mesne process founded on such demand, for a period of seven days, then no cases exist which would not fall within the first clause, and the second clause would become inoperative and might as well have been left out of the statute. A statute must be so construed, if possible, without doing violence to language, as to give force and meaning and effect to every part of it. In this case there is no affirmative repugnancy between the two clauses. The only question is, whether it shall be held to be the intention of the Legislature that cases falling within the second clause shall be governed wholly by the second clause, although, if the second clause had been omitted from the section, they would fall under the first clause. I think that that is the sound construction to be given. Even if the two clauses were repugnant to each other, in a broader sense than they are, the second clause would control, as being the later expression of the will of the law-makers. (*Powers* v. *Barney*, 5 Blatchf., C. C. R., 202.)

I must therefore hold, that inasmuch as the debtor was not actually imprisoned for more than seven days on the order of arrest issued against him, he is not liable to be adjudged a bankrupt by reason of anything alleged in the petition to have occurred under and by virtue of such mesne process.

The second act of bankruptcy alleged in the petition is, that the debtor "on the 24th day of August, 1869, being a merchant or trader, has fraudulently stopped and suspended payment of his commercial paper and has not resumed within a period of fourteen days, to wit, a certain promissory note," specifying its particulars. The 39th Section of the act makes it an act of bankruptcy that the debtor, "being a banker, merchant, or trader, has fraudulently stopped or suspended payment and not resumed payment of his commercial paper within a period of fourteen days." The evidence shows that the debtor was a merchant or trader, doing business in the city of New York; that the promissory note mentioned in the petition was commercial paper, by having been made and delivered by the

debtor in the regular course of his business, for goods sold and delivered to him; and that the note had, at the time the petition was filed, remained unpaid for a period exceeding fourteen days. This is not sufficient. Something must be shown from which the court can draw the conclusion that the stoppage or suspension of payment of the note was fraudulent. The mere non-payment of the note does not warrant such conclusion. It was not intended by the act that the mere stoppage or suspension, followed by non-resumption for fourteen days, should throw on the debtor the burden of showing that there was no fraud in the stoppage or suspension. It is for the creditor to show that the stoppage or suspension was fraudulent. That is not shown by showing nothing but stoppage or suspension, continued for fourteen days. There may be many reasons for stoppage falling short of fraud. If the Legislature had intended that mere stoppage or suspension without resumption within fourteen days, should be an act of bankruptcy, it would have said so plainly. It has unmistakably said that that shall not be an act of bankruptcy, unless the stoppage or suspension is fraudulent. The creditor must, therefore, show the fraud which he has alleged in his petition. As he has failed to do so, from misapprehension, an opportunity will be afforded to him to supply the defect, if he can, by further proof.

Hawes and *Wardell*, for the creditor.

Morrison, *Lauterbach*, and *Spingarn*, for the debtor.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Bankrupt executed a deed of trust of certain lands in Florida, which was duly recorded; but trustees never took possession or steps to carry out the trust, but the property remained in the possession of bankrupt. Assignee petitioned to have the trust-deed set aside and delivered up to the trustees to be canceled, as throwing a cloud on title.

***Held*, it not being alleged and no facts shown that such conveyance was in fraud of creditors, the petition must be dismissed with costs.**

In re Broome.

It should have been alleged and proved that the conveyance was in fraud of creditors under the laws of Florida, wherein the land is situate.

In re JAMES E. BROOME.

BLATCHFORD, J.—The petition of the assignee in bankruptcy alleges only that the trust-deed which it sets forth was made, conveying the lands in Florida described in the deed; that it was duly delivered to the grantees and recorded by them; that the conditions on which the trust was to be carried out came into operation, but the trustees did not take possession of the lands or take any steps to carry out the trust; that the bankrupt remained in possession of the lands until he filed his petition in bankruptcy, and that the assignee cannot make sale of the lands while the trust-deed remains as a cloud on the title. The petition then prays that the trust-deed may be set aside and delivered up by the trustees to be canceled and removed from the records in Florida. There are no allegations to sustain the prayer for relief. The petition does not allege that the lands were conveyed by the bankrupt in fraud of his creditors, nor does it state any facts showing that they were so conveyed, so as to show that the lands passed to the assignee in bankruptcy, as being, within the 14th Section of the act, property conveyed by the bankrupt in fraud of his creditors. As the property was real estate situated in Florida, it should have been alleged and proved that the conveyance was in fraud of creditors under the laws of Florida.

The petition is dismissed with costs.

John McDonald, for the assignee in bankruptcy

Alexander & Green, opposed.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Bankrupt was under examination by his assignee and refused to answer certain questions touching his acquirement and possession of considerable amounts of money after proceedings in bankruptcy.

Held, the questions were proper and relevant as directed to the point of inquiry when and how did the bankrupt acquire the same, and must be answered.

In re CHARLES MCBRIEN.

Southern District of New York, ss:

I, JAMES F. DWIGHT, Register of said court in bankruptcy, hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to said proceedings, and was stated and agreed to by counsel for the opposing parties, Mr. John Sedgwick, assignee, etc., and Mr. Robert N. Waite, attorney for the bankrupt.

The bankrupt being under examination declined and refused to answer certain questions propounded by the said assignee who was examining him. The said questions are fully set out in the statement of the assignee hereto annexed.

And the said parties requested that the same should be certified to the judge for his opinion thereon, which is hereby done and the statements of the said parties hereto attached.

I think the questions should be answered.

JAMES F. DWIGHT, *Register*.

STATEMENT OF COUNSEL.

The counsel for assignee insists that on the examination of the bankrupt, Questions "370: When did you first do any business, if at all, after filing your petition? 371. Have you done any business since you filed your petition? 372. Before going into business, after filing your petition, were you in the possession of any money? 373. Have you had any place of business since filing your petition? 374. Since filing your petition, have there been kept any books of account of your business? 375. Since filing your petition, have you kept in your own name or otherwise any bank account? 376. In the month of April, 1868, were you not in the possession of or control of some hundreds of dollars in money? 377. Since filing your petition, have you not made deposit of some thousands of dollars in money? 378. Since filing your petition herein on the 11th of March, 1868, and before April 6th, 1868,

did you not make deposit of some thousands of dollars in money?" were relevant, and bankrupt should answer them. The assignee was entitled to any facts, directly or circumstantially tending to show that the bankrupt, before filing his petition in bankruptcy, was in possession of money, which he had concealed, but which should have gone to the assignee. Now, the questions, if answered, might have exhibited this train of circumstances, that on the 11th of March, 1868, the bankrupt filed his petition, that from that time to April 6th, 1868, he did no business, or if he did any business he made no money in it, but that on the 6th of April, 1868, he was in possession of some hundreds or thousands of dollars in money.

The assignee might then claim that the bankrupt was to show affirmatively how (if such was the fact), that being in no business or making no money, he acquired that money subsequent to the adjudication of bankruptcy, or the assignee, knowing by the answer to the questions, that bankrupt was under the exceptional circumstances in possession of money, be able to trace out the occurrences, and show by bankrupt's or other witnesses' testimony that that money had been acquired by bankrupt before the filing of the petition.

At any rate, the position taken, that, because the assignee is not entitled to property acquired by him after filing his petition, the bankrupt is not obliged to disclose whether he was in possession of large sums of money soon after bankruptcy, is not sound. The point of inquiry in such cases is, *when* did the bankrupt *acquire* it, and how? The assignee will have to show that it was acquired before bankruptcy, and he may also show that, though acquired after, still it was the proceeds of property or effects belonging to the assignee. An investigation may commence by showing means and going to the result, or showing the result, and discovering the means by further examination.

The assignee distinctly asserts that the purpose was not to obtain information as to property acquired by bankrupt after filing his petition, but was to show that he had a large sum of money in his possession at the time of going into

bankruptcy, which he concealed until April 6th, 1868, when he deposited it for his own purposes.

JOHN SEDGWICK,
of Counsel for Assignee, etc.

Counsel for bankrupt submit that he was not compellable to answer the questions severally numbered 370, 371, 372, 373, 374, 375, 376, 377, and 378.

BLATCHFORD, J.—The questions set forth in the statement of the assignee were proper and relevant, and must be answered by the bankrupt.

The clerk will certify this decision to the Register, James F. Dwight, Esq.

UNITED STATES DISTRICT COURT—NORTH CAROLINA.

L. C., a creditor, recovered two judgments, in a County Court of North Carolina, against a debtor, executions on which judgments were enjoined by the United States Military Commandant. The injunction was thereafter rescinded, and *fieri facias* were filed, but never delivered to or acted on by the sheriff. Subsequently two other judgments against said debtor were respectively obtained by R. T. and De V. & G., creditors, upon which executions issued, and property of debtor was levied on by the sheriff, before proceedings commenced in bankruptcy. Debtor thereafter was adjudged bankrupt, and assignee was appointed, who agreed with the sheriff that the property so levied on should be offered and sold by the assignee, free from all encumbrances, on account of said executions and levies, and it was sold accordingly.

Held, that L. C., the senior judgment creditor, is not entitled to any of the proceeds of said sale, as he had no perfected lien upon proceedings commenced in bankruptcy.

The action of the United States military officer preventing him from issuing executions, does not help or cure the defect.

The junior judgment creditors are entitled to have their claims paid *pro rata* by the assignee out of said proceeds, after deducting expenses, costs, and fees of sheriff and assignee, and this by virtue solely of said agreement.

It is not the duty of an assignee to petition the court respecting the sale of encumbered property of bankrupt, unless he believes such sale will produce a larger fund for the general creditors whom he represents.

Assignee may sell encumbered property in his possession without petitioning the court, or without an order of the court, but in so doing he sells subject to lawful encumbrances. He can convey no higher or better interest than he took.

In re JOHN A. MEBANE.

BROOKS, J.—This is a case agreed under the provisions of the 6th Section of the Bankrupt Act of March 2, 1867.

Lewis Cobb recovered two judgments against John A. Mebane, said bankrupt, in the County Court of Guilford county, at the August term, 1867. Executions on said judgments were enjoined or forbidden to be issued by the Military Commandant at the Post of Greensboro', who was acting, at that time, under General Orders from the Headquarters of the Second Military District. By reason of the orders of the Post Commander, no execution issued from the said term.

The said order was rescinded in April or May, 1868, and thereupon the clerk of the Guilford County Court filled up writs of *fieri facias* on said judgments, tested of the May term, 1868, which executions were never taken from the clerk's office, and never came to the hands of the sheriff, nor were they in any manner acted upon by the sheriff.

At a special term of the Superior Court of Guilford county, held in December, 1867, two other judgments were obtained against John A. Mebane, said bankrupt, one in favor of Robert Thomas, administrator, and the other in favor of De Varnet & Gerringer; upon which executions regularly issued and were levied by the sheriff of Guilford county, on the real and personal property of the defendant, in February, 1868, and before the commencement by him of proceedings in bankruptcy. The property so levied upon was not sold until after the appointment of an assignee. Subsequently to the appointment of Peter H. Adams as assignee, and the execution of the assignment to him, the said assignee, by the consent of and agreement with the sheriff, sold the real estate so levied upon. Pursuant to said agreement between said assignee and sheriff, the assignee offered said real estate, clear of any and all encumbrances, on account of said executions and levies.

The question presented, and upon which the opinion of the court is desired, is, which of the judgment creditors is entitled to the proceeds of the sale, or so much thereof as will satisfy their debts.

It appears to be conceded that if Cobb is not so entitled, the plaintiffs in the junior judgments are.

I hold that but for the agreement between said assignee and

the sheriff, and the terms of the sale made by the assignee, pursuant to such agreement, neither of the judgment creditors, in the present condition of the claims, would have been entitled to any part of the money realized by the sale.

Upon the bankruptcy of a party all right and interest in the whole of the property he has at the time passes to his assignee, excepting only such of it as shall be exempted and subject only to existing legal liens or encumbrances.

The Bankrupt Act respects existing, perfected liens. There is in the 1st Section express provision in regard to their ascertainment and liquidation.

The judgments in favor of Lewis Cobb were first obtained, and it becomes necessary to inquire whether such proceedings were had as were necessary to create in his behalf a lien upon the land of the bankrupt, Mebane, before proceedings in bankruptcy in his case were commenced.

I do not think any lien was so created in his behalf. The filling up of the *fieri facias* by the clerk was not *issuing the executions*. And even if they had been delivered to the sheriff, and he had not acted upon them by making and returning a levy, no lien would have been created in behalf of the plaintiff.

In some of the States, by statutory provision, a judgment is made a lien from the time of its rendition. It was not so in North Carolina prior to the enactment of the Code of Civil Procedure. A levy was required to complete a lien.

It does not help the plaintiff, Cobb, that his executions were enjoined by military power. He may have been greatly wronged by such interference. But this court cannot repair that wrong. In truth, the plaintiff, from that or some other cause, did not do, or procure to be done, an act indispensable to the perfecting of a lien.

This may be set down as one of the many acts, *extra constitutional* or *extra legislative*, perhaps, performed by the military authorities subsequent to the cessation of hostilities, wherein powers of a questionable nature, some of them undefined, were exercised, and authority not warranted by law being frequently assumed. It would then be a matter of no surprise if many

things were done, resulting in injuries beyond the ability of the courts to remedy, while keeping within the limits prescribed by the Constitution and Laws.

The next inquiry is: Did the plaintiffs in the junior judgments, at the instance of Robert Thomas, administrator, and De Varnet & Gerringer, so prosecute their claims as to acquire liens before the bankrupt filed his petition in bankruptcy?

I think they did. They obtained their judgments, and immediately followed them up by executions, which were received by the sheriff, and by him were levied upon the land of the defendant, who afterwards became a bankrupt.

By these proceedings a lien in behalf of these plaintiffs was clearly and perfectly created.

It does not follow, however, that the proceeds realized by the assignee's sales of the property so encumbered should be applied to the satisfaction of such executions. If it be ascertained that the property of a bankrupt is encumbered by lien or mortgage, the assignee may, if he shall believe it to be to the interest of that class of creditors whom he especially represents—for instance, the class entitled to *pro rata* distribution—file his petition, and obtain an order directing him to sell the property encumbered, on such terms as to the court may seem proper, and convey the property freed from such encumbrances. The court will then protect the lien creditors by a proper disposition of the proceeds. But it is not part of the duty of an assignee so to petition, unless he shall believe such a sale will create a larger fund *for distribution to creditors generally* than if there should be a sale by the mortgagee or sheriff. So in regard to property the title to which is in dispute.

The assignee may sell, however, without petitioning the court, or without any order of the court, any property of the bankrupt in his possession encumbered in any manner. But when he so sells, he does so subject to any and all lawful encumbrances, and can convey no higher or better interest. The proceeds of such a sale are supposed to be the price or value of the interest so sold, and with a knowledge of the encumbrances.

I think this is not the rule, however, to apply in this case, for the real estate was offered by the assignee in conformity to the agreement with the sheriff, who, with executions in hand, was claiming all his rights under them, concurring with all parties in interest that a sale clear of encumbrances would prejudice no one, but be the surest means of obtaining fair prices. The bidders had good reason to believe that they were bidding for a good title.

It is therefore ordered and decreed by the court that the assignee, Peter H. Adams, of the proceeds of the sales of the property levied upon as aforesaid, pay the executions in favor of Robert Thomas, administrator, and De Varnet & Gerringer, if sufficient, first paying costs of sale, etc., and retaining his lawful commissions. And if the same shall not be sufficient for that purpose, that he pay the cost, and retain his commissions as aforesaid, and distribute the surplus proceeds of such sales *pro rata*, in the payment of said last-mentioned executions.

Let this be certified to the parties to this case agreed.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

Creditors on a promissory note had judgment, docketed prior to proceedings in bankruptcy, against four bankrupts, as joint debtors, and sought to have it paid out of the proceeds of certain real estate in New York, purchased originally with partnership funds of J. A. and J. N. H., two of said joint debtors, and the legal title of which was in J. N. H., who, however, had not been served with process, nor appeared in said cause, and against whom there was no judgment on which his individual property could be sold.

Held, said creditors had no valid lien at law on said real estate, nor had they a valid, equitable lien on the equitable interest of the partner J. A., by virtue of said judgment.

No lien is obtained on equitable interests by judgment and execution alone, and creditors took no proceedings to reach such equitable interest, or establish an equitable lien.

Proceedings in bankruptcy may be regarded as an equitable attachment, and the equitable interest vested in the assignee in bankruptcy for the benefit of all the creditors.

In re JOSEPH N. HINDS, JACOB ALLEN, BENJAMIN ALLEN, AND ALVIN B. LOSEE.

HALL, D. J.—This is a petition asking that the amount

due upon a judgment rendered against the four bankrupts, as joint debtors, in an action in which Joseph N. Hinds was not served with process, and in which he did not appear (so that there was no judgment upon which his individual property could be sold), be paid out of the proceeds of real estate, the legal title of which was in Joseph N. Hinds alone.

The petition concedes that the judgment was not a legal lien upon the individual property of Joseph N. Hinds, and that it could not be sold thereon; but it alleges that the judgment was obtained upon a note given by the bankrupts in their firm-name of Hinds, Allen & Co., for the sole and only purpose of securing the payment of a note previously given by Joseph N. Hinds and Jacob Allen, under their firm-name of Hinds & Allen; that for a long time prior to 1867 (the petition on which the bankruptcy of Hinds, Allen & Co. was adjudged, was filed against them on the 23d of December, 1868), the said Joseph N. Hinds and Jacob Allen had carried on business under the firm-name of Hinds & Allen, and had, with the assets of that firm, purchased for the use and benefit of the firm, the real estate above referred to; that said real property was owned and occupied by the firm on the day, and long after the day, on which the said judgment was docketed; that the two firms aforesaid existed up to the time the original petition was filed in this case, and that such real estate has been sold by the order of this court, free from encumbrances. The order of sale reserved to the owners of such judgment the right to apply for payment thereof, out of the proceeds of the sale; and it is claimed that the petitioner is therefore entitled to the relief sought.

The judgment referred to was docketed, so as to become a lien on real estate, October 22, 1868; but the petition does not show at what time the debt, on which such judgment was given, was contracted, or at what time the real estate referred to was conveyed to Joseph N. Hinds, for the use and benefit of Hinds & Allen; or that the execution issued on the judgment had been returned unsatisfied in whole or in part.

The affidavit of Joseph N. Hinds denies that the judgment

referred to was recovered on account of a debt which was originally the debt of Hinds & Allen, and states that such debt was, from its origin, a debt against Hinds, Allen & Co., arising out of a purchase made by that firm in October, 1867; and in this he is fully corroborated by the testimony of the bookkeeper of these two firms.

On these papers it is certainly most reasonable to conclude, that the real estate referred to was purchased subsequent to 1830, and a considerable time before the debt on which the judgment owned by the petitioner, who seeks its payment, was contracted.

The mere payment of one-half of the purchase-money of this real estate by Allen, at the time it was conveyed to Hinds, can give to the judgment-creditor no right to the same, by reason of his holding a judgment which binds the property of Allen alone; the provisions of the Revised Statutes of 1830 (which are still in force), contained in Sections 51 and 52 of the article "Of Uses and Trusts," modified the previously existing law; and they are clearly inconsistent with the existence of any such right. These sections are as follows:

SEC. 51. "When a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section."

SEC. 52. "Every such conveyance shall be presumed fraudulent, as against the creditors, *at that time*, of the person paying the consideration; and where a fraudulent intent is not disproved, a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their just demands."

Under these sections no trust can result to the creditors of Jacob Allen, unless they were such at the time the conveyance was made to Joseph N. Hinds. (*Garfield* v. *Hatmaker*, 15 N. Y., 475; *Brewster* v. *Power*, 10 Paige, 562.) And except as against such then existing creditors, the whole estate vested in Joseph N. Hinds, discharged of any trust in favor of Allen or

his creditors, except that growing out of their relations as partners, and the fact that the property was purchased and paid for by the firm, and was in equity copartnership property.

But, assuming that Jacob Allen, as the partner of Hinds, had an equitable interest in this property, it is proper to inquire whether the judgment and execution against Jacob Allen, as one of the partners served with process, entitles the petitioner to any payment upon his judgment out of the proceeds of the real estate thus held by Joseph N. Hinds, on the ground that Jacob Allen had an equitable interest therein, which was in equity bound by such judgment and execution.

Prior to 1830, and under the express provisions of the Statute of Uses (1 Rev. Laws, 74, Section 4), an equitable estate or interest in lands by reason of their being seized or possessed to the use of, or in trust for, the execution debtor, was the subject of sale by execution at law, *provided*, the judgment-debtor *had the entire equitable interest* (*Lynch* v. *Utica Ins. Co.*, 18 Wendell, 136); but the general rule was and is, that a mere equitable interest cannot be reached by an execution at law (*Hendricks* v. *Robinson*, 2 Johns. Chan. R., 283 and 312. *Jackson* v. *Chapin*, 5 Cowen, 485. *Lynch* v. *Utica Ins. Co.*, *ufi supra*, p. 249); and neither our Revised Statutes nor the Code provide for the sale of such equitable interests upon execution. It may therefore be safely assumed, that the interest of Jacob Allen in the lands purchased by and for the copartnership of Hinds & Allen, and the legal title of which was in Joseph N. Hinds only, was an equitable interest not bound by the judgment and execution against the property of Jacob Allen, and that the aid of a court of equity would be required to obtain satisfaction out of such equitable interest, of a judgment against Hinds & Allen, in a case where Hinds was not served with process and did not appear in the suit; and in a court of equity the proceeds of the sale of this property would not be applied to the payment of the judgment on which this petition is based, until all the debts of Hinds & Allen were fully paid.

There is, then, an insuperable objection to the granting of the prayers of this petition. The proof shows that the real

estate sold, was in equity the property of the firm of Hinds & Allen, and that the judgment owned by the petitioner was obtained upon a debt of Hinds, Allen & Co., an entirely different firm. Under the general rule in regard to the distribution of copartnership and individual assets, which prevails in courts of equity, and which has been expressly adopted by the 36th Section of the Bankrupt Act, the proceeds of the sale of the real estate referred to must be applied to the payment of the debts of Hinds & Allen, in preference to those of Hinds, Allen & Co., and no part of such proceeds can be applied to the payment of the debts of the latter firm, until the debts of Hinds & Allen are fully paid.

Even if the debt on which the judgment was given, was, when originally contracted, a debt of Hinds & Allen, as alleged in the petition (but which is disproved), the taking of the note of Hinds, Allen & Co., for that debt, and the obtaining of a judgment thereon, would clearly extinguish the debt against Hinds & Allen, and make it the proper debt of Hinds, Allen & Co.

But it was insisted upon a prior application in respect to this judgment, that by the recovery and docket of the judgment against Hinds, Allen & Co., the judgment-debtor obtained an equitable lien against the real estate of Joseph N. Hinds, although his property could not be sold on the execution issued on such judgment.

The provisions of the Revised Statutes and of the Code which declare the effect of such a judgment necessarily repel such a claim. (*Purdy* v. *Doyle*, 1 Paige, 658; *Oakley* v. *Aspinwall*, 4 Coms., 514; *D'Arcey* v. *Ketchum*, 11 How., U. S. Rep., 174.) These cases show that the judgment is not even evidence of indebtedness as against Joseph N. Hinds, and *a fortiori* it is no lien in equity, any more than at law, upon the separate property of Hinds.

But independent of the grounds already considered, it is quite certain that the prayer of the petition should be denied. It is, I think, well settled in this State that a judgment creditor obtains no lien in equity upon choses in action or equitable

interests in real or personal property, by the return of his execution unsatisfied, but only by the filing of his bill in equity, or the taking of other legal proceedings to reach such choses in action, or equitable interests. (*Edmeston* v. *Lyde*, 1 Paige, 637; *Corning* v. *White*, 2 Paige, 567.) The proceedings in bankruptcy commenced by one or more of the creditors of the bankrupt, for the benefit of all, are in the nature of an equitable attachment as against the equitable estate of the bankrupt; and the assignee, as the representative of all the creditors of the bankrupt, and whose title relates back to the date of the filing of the petition, thereby becomes the owner of such equitable interest, with an equity superior even to a judgment creditor who has an execution returned unsatisfied, but who had obtained no equitable lien by filing a creditor's bill or taking other proceedings to reach such equitable estate. The commencement of the proceedings in bankruptcy may well be regarded as an equitable attachment; and as it is a cherished rule of Courts of Chancery that "Equality among Creditors is Equity," such courts would give effect to such equitable attachment and preserve the rights thus acquired for the benefit of all the creditors of the bankrupt, even if the legal title of the assignee did not relate back to the filing of the petition. But if no lien had been acquired prior to the filing of the petition, none could be afterwards acquired by the judgment creditors, as the legal title of all the property of the bankrupt vests in the assignee by relation, under the express provisions of the Bankrupt Act, at the time the creditor's petition is filed against the bankrupt.

Besides the petition does not show that the execution issued on the judgment mentioned in the petition had been returned unsatisfied, and the general rule is that no lien is obtained on equitable interests or choses in action by judgment and execution alone, even where it is held that such lien exists after the return of an execution unsatisfied, on the ground that such return shows that the creditor has exhausted his remedy at law, and is therefore entitled to proceed in equity.

The prayer of the petition is denied with costs.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

Married woman did business in her own name by her husband acting as her agent, and exercising entire control and management of the same in his discretion. She became unable to pay her debts in the ordinary course of business, as persons in trade usually do, and executed mortgages of property to secure creditors on pre-existing debts, and thereafter was adjudicated a bankrupt. On the questions raised upon petition of the assignee to have the said mortgages set aside as invalid,

Held, the acts of the husband as agent of the bankrupt, his knowledge and intentions, are the acts, knowledge, and intentions of the bankrupt.

The said mortgages created a fraudulent preference, and were therefore void, the mortgagees having had reasonable cause to believe the mortgagor was insolvent; reasonable cause being such cause as would induce the belief in the mind of an intelligent, capable, business man.

Security given to a creditor by an insolvent debtor, out of the ordinary course of business, cannot be held valid simply because it proceeded from the voluntary act of the debtor without previous communication with the favored creditor, either as to the security or debtor's financial condition.

When a creditor accepts a security, he is conclusively presumed to know what appears on its face, and to have reasonable cause to believe it was intended to accomplish its ordinary and necessary effect.

It is no defense of such mortgages that they were security which the debtor, long before, when solvent, at the time of the debts incurred, had promised to give the creditors, and that they were finally given under pressure of said creditors.

In re LEWIS B. GRAHAM, *Assignee of* CAROLINE A. MARTIN, v. OLIVER STARK AND ELIZABETH B. SAVAGE.

HALL, J.—This is a proceeding by the assignee of Mrs. Martin, to set aside certain mortgages executed by her prior to the filing of the petition, on which she was adjudged a bankrupt.

The creditor's petition, on which such adjudication was made, was filed on the 5th day of November, 1868; and she was adjudged a bankrupt on the 2d day of February, 1869.

Mrs. Martin, a married woman, had, by her husband, De Lancey Martin, as her general agent, carried on the business of buying and selling hats, furs, gloves, and furnishing goods, in her own name, and professedly, at least, on her separate account, for some years prior to May 28, 1868. Her husband, in the conduct and management of this business, acted according to his own discretion, without any active interference or controlling supervision of the bankrupt. Indeed, the husband testified that the business was left *wholly* to him; that she knew nothing about the state of affairs in the store, except what he

communicated to her; and she testified that he had the sole charge of the business.

The stock kept on hand was generally worth from ten to fifteen thousand dollars, and the annual sales were ordinarily from fifteen to twenty thousand dollars.

In the course of this business, Mrs. Martin contracted debts from time to time; and on the 28th of May, 1868, such debts, including those secured on real estate, exceeded ten thousand five hundred dollars, and De Lancey Martin testified that such debts might have been nearly twelve thousand dollars. At that time the stock of goods on hand was probably worth about seven thousand dollars, and she had a few dollars in cash and notes and accounts, worth in all about fifteen hundred dollars. She had, besides, a house and lot in Penn Yan, worth from three thousand to three thousand five hundred dollars, on which were two mortgages, amounting to sixteen or seventeen hundred dollars, both of which were overdue. Among her debts, owing to more than twenty different parties (the larger portion of which debts were overdue), was the debt due to the respondent, Elizabeth B. Savage, of four thousand eight hundred and four dollars and twenty-seven cents, for money borrowed in 1865, and in the spring of 1866. It was borrowed to pay debts in New York, and was used for that purpose.

There was also among such debts, the debt of one thousand one hundred and eleven dollars and sixty-three cents to the respondent, Oliver Stark; one thousand dollars of which was owing upon a note which he had discounted for her, and on which one Bridgen, a brother-in-law of the bankrupt, was an accommodation indorser; and which note was to become due June 22d, 1868. The original discount had been made two or three years before; and it had been renewed, from time to time, on notes payable in sixty days or three months, until the then existing note was given about the 20th day of March, 1868. The remaining one hundred and eleven dollars and sixty-three cents was for an over-draft by the bankrupt, which had occurred about a month before.

On or about the 28th of May, 1868, the bankrupt gave her

promissory note of that date to the respondent, Savage, for four thousand eight hundred and four dollars and twenty-seven cents, payable one day after that date; and at the same time executed to her a chattel mortgage of that date, upon the bankrupt's whole stock of goods, conditioned for the payment of four thousand eight hundred and four dollars and twenty-seven cents, according to the terms of such note.

In addition to this chattel mortgage, the bankrupt also executed a mortgage upon her house and lot to secure one thousand dollars of such debt, payable one day after date, as collateral security to said chattel mortgage. This mortgage, though executed at the same time with the chattel mortgage, was dated on the 30th day of May, 1868. At the same time the bankrupt executed to the respondent Stark another chattel mortgage on the whole of her stock of goods, to secure to him the payment of one hundred and eleven dollars and sixty-three cents, one day after date, and the payment of the above-mentioned note of one thousand dollars, on which the brother-in-law of the bankrupt was an accommodation indorser.

After the execution of these instruments, and about the 2d of June, 1868, the bankrupt went to the western States and remained absent from this State until the 15th of October of that year, and until after an attachment had been levied upon her property at Penn Yan. A day or two before her return she executed a deed in fee of her house and lot at Penn Yan to one Blackman, without consideration paid at the time. Blackman had, however, sent her small sums of money for her expenses at three or four different times while she was absent from the State, but the amount he had so sent her does not appear.

After the execution of the mortgages to the respondents, De Lancey Martin, as the agent of the bankrupt, continued in the possession of the stock of goods mortgaged, with the knowledge and assent of the mortgagees; and he continued to sell the goods mortgaged at retail, as usual, until the 6th of October, 1868. He also bought new goods, defrayed current expenses, including payments for his own board, paid small debts

to various persons, and kept the books of the establishment, and otherwise carried on the business of the bankrupt, the same as before the mortgages were given.

On the 6th of October, the respondents took possession of the goods mortgaged and turned De Lancey Martin, the bankrupt's husband and agent, out of the store. They then, by their own agent, continued the business and sold at retail, for three months or thereabouts; and then sold the remainder of the goods to De Lancey Martin for one thousand dollars; and four notes of two hundred and fifty dollars each, payable at four, six, eight, and ten months, were given for the price of such goods.

The change of possession on the 6th of October was made in the morning of that day, just before an attachment which had been issued against the bankrupt was levied on such of the notes and accounts which had belonged to her as yet remained on hand.

For some years prior to May, 1868, Mrs. Savage, the respondent, had lived in the bankrupt's house as her tenant, and Mr. and Mrs. Martin had boarded with Mrs. Savage—the amount charged for board and rent being nearly equal. Mrs. Savage continued to occupy the house, and Mr. Martin continued to board with her, until after possession was taken under the chattel mortgages on the 6th of October, 1868. In July, 1868, Mrs. Savage purchased a mortgage of six hundred dollars and interest on Mrs. Martin's house and lot, and in November she purchased the other mortgage on the same of one thousand dollars and interest. Both these purchases were made with the proceeds of the sales of the property mortgaged to her by the bankrupt on the 28th of May, 1868. In March, 1869, Mrs. Savage commenced an action to foreclose these mortgages, and the one thousand dollar mortgage executed to her as before stated; but her proceedings in that action were stayed by injunction.

It appears from the testimony of De Lancey Martin, that when the money was borrowed from Mrs. Savage, and when Mr. Bridgen indorsed the sixteen hundred dollar note, it was

agreed that they should be secured; that Mrs. Savage had asked for security for her debt one or two months before the bankrupt went West, and that she spoke about it, and asked for such security several times before it was given—urging that she wanted the bankrupt to give her security before she went away.

Bridgen had also frequently urged that the one thousand dollar note should be paid, and he had asked in the spring of the same year that security should be given in case it was not soon paid.

Having thus given the more prominent and undisputed facts of the case, the controverted questions of fact and law will now be discussed, and in doing this, further reference to the evidence bearing upon these questions of fact will necessarily be made.

Upon the question of the actual and hopeless insolvency of the bankrupt, at the time the mortgages to the respondents were given, there can be no well-founded doubt. The apparent denials of the knowledge of this insolvency on the part of the bankrupt and her husband, must, in charity, be ascribed, so far as the husband is concerned, to a misapprehension of the legal definition of that term, as used in the Bankrupt Act—a misapprehension quite likely to arise from the not uncommon misunderstanding of that term, and so far as the bankrupt is concerned, to a similar misapprehension, or to the fact that her actual financial condition had been carefully concealed from her by her husband. There is no pretense that she had met with any considerable loss, or that her pecuniary circumstances had materially changed between the 28th of May, 1868, and the time the respondents took possession of her stock of goods on the 6th of October thereafter, and upon the whole evidence it is entirely certain that Mrs. Martin was then wholly unable to meet her engagements and pay her debts in the ordinary course of business, as persons in trade usually do, and she was therefore insolvent within the meaning of the Bankrupt Act.*

* 2 Kent's Com., 389; *Thompson* v. *Thompson*, 4 Cushing, 127; *Lee* v. *Kilbourne*, 3 Gray, 594; *Spratt* v. *Hobhouse*, 4 Bingham, 173; *Buckingham*

That De Lancey Martin, the agent of the bankrupt, and who had the entire management and control of her business, well knew that she could not meet her engagements, as persons in trade ordinarily do, is entirely clear; indeed, he must have known that there was no probability that she would be able to continue her business and pay her debts in full, and when the chattel mortgages were given upon her whole stock in trade to secure nearly five thousand dollars, payable in three or four days thereafter, and one thousand dollars more in less than thirty days, he must have contemplated the entire breaking up of the bankrupt's business, as a thing of course, whenever the pressure of other creditors who had no security—several of whose debts were then past due—should induce the mortgagees, for their own security, to take possession of the property mortgaged.

And he must also have foreseen that the fact that Mrs. Martin had thus encumbered her whole property by these mortgages would cause her unsecured creditors to endeavor to procure payment of their debts, or force Mrs. Martin into bankruptcy, very soon after they obtained a knowledge of the existence of such mortgages.

In the directions for, and in the preparation of these mortgages—indeed, in everything except the mere formal execution of the mortgages—De Lancey Martin acted for the bankrupt, and his acts, his knowledge, and intentions, for the purposes of this case, are, in law, the acts, knowledge, and intentions of his principal, the bankrupt. Story on Agency, Sections 140, 140 *d.*, and 451.

That he, as such agent, intended that these mortgages should secure the payment of the debts of the respondents in preference to the debts of other creditors; and that he procured their preparation and execution in contemplation of the bankrupt's insolvency, is beyond question; and it hardly can be doubted

v. *McLean*, 13 Howard, 150; *Merchants' National Bank* v. *Truax*, 1 N.B.R., 146 *quarto*, 545 *octavo*; *In re* Black, 1 N. B. R., 353; *In re* Gay, 2 N. B. R., 114 *quarto*, 358 *octavo*; *In re* Louis, 2 N. B. R., 449; *Morgan* v. *Mastick*, 2 N B. R., 521.

that he then contemplated the subsequent bankruptcy of Mrs. Martin, and actually intended (as the law under such circumstances presumes he intended), to defeat the ordinary operation and effect of the Bankrupt Law, which secures a *pro rata* division of a bankrupt's property to and among his or her creditors. In short, in view of the special provisions of the Bankrupt Act presently to be noticed, and of its general policy and provisions, as well as of the rule of law that every one must be presumed to intend the natural and usual consequences of his voluntary acts, it must be considered as entirely certain that the execution of the three mortgages to the respondents were acts of bankruptcy and fraud, so far as the bankrupt herself is concerned, and contrary to the provisions of the Bankrupt Act.

The 29th Section of the Bankrupt Act provides, among other things, that no discharge shall be granted to a bankrupt if he has *given any fraudulent preference contrary to the provisions of that act*, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his estate; or if he has, in contemplation of becoming a bankrupt, made any pledge, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under any liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under the act in satisfaction of his debts; or if he has been guilty of any fraud whatever, contrary to the true intent of the act.

The 35th Section provides, among other things, that if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, *conveyance*, or other disposition of any part of his property *to any person who then has reasonable cause to believe him to be insolvent*, or to be acting in contemplation of insolvency, *and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being*

distributed under this act, or to defeat the object, *or in any way impair, hinder, impede, or delay the operation* and effect of, or to evade any of the provisions of this act, *the sale, assignment, transfer, or conveyance, shall be void;* and the assignee may recover the property or the value thereof as assets of the bankrupt; and that if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud.

The 39th Section provides, in substance, among other things, that it shall be an act of bankruptcy if any one, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, sale, conveyance, or transfer of money or other property, rights or credits, *with intent to give a preference to one or more of his creditors*, or with the intent, by such disposition of his property, to defeat or delay the operation of the Bankrupt Act; and that if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to that act; *provided* the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, and that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy.

Having already determined that the securities given by the bankrupt must be considered as fraudulent and void under the provisions of the Bankrupt Act, provided the parties accepting the same had reasonable cause to believe Mrs. Martin was insolvent, and that a fraudulent preference or other fraud on the Bankrupt Act was intended, or that it was intended thereby to defeat the object of or evade any of the provisions of the Bankrupt Act, it becomes necessary to decide whether the respondents had such reasonable cause to believe at the time they took these mortgages; and the question of the existence of this reasonable cause is the most serious and important of those litigated in the present case.

It must be observed that the question is not as to the actual belief of the creditors, but whether they had reasonable cause

for the belief specified in the statute; such reasonable cause as would induce the belief in the mind of an intelligent, capable, business man.

In respect to Mrs. Savage there is abundant proof of such reasonable cause. She had, as she herself testified, loaned to the bankrupt in the fall of 1865, a part of the sum for which the mortgages to her were given, and the greater part in the spring of 1866, taking care to provide that she should have security whenever she required it. Although she could not remember when that loaned in 1865 was agreed to be paid, she testified that it was all to be paid in the fall of 1866, or the early part of the succeeding winter, or before. The evidence shows that no part of it was paid when due, or afterwards prior to the execution of these mortgages; and the whole had been overdue, without any actual extension of the time of payment, for some eighteen months before the mortgages were given. She understood that payment was not made because the bankrupt had not the money to pay; she frequently asked for payment or security, and in the spring of 1868, a month or two before the mortgages were given, and after she had learned that the bankrupt was going West on a visit, she not only asked for but *insisted* upon having security. She took a mortgage upon the whole of the bankrupt's stock of goods, being all the personal property she had except some one thousand five hundred dollars' worth of accounts, etc.; and another upon all her real estate for as much as such real estate would be likely to sell for, subject to encumbrances, at a forced sale; and the amount secured was by the terms of these mortgages to be paid in less than five days afterwards. She lived in the same house with the bankrupt, and was frequently in the bankrupt's store, and doubtless saw that the stock on hand was light; and she, or the person acting for her, knew of the Stark mortgage; and she not only took the mortgage on the stock, but also required one on the real estate also, as further security.

She did this knowing that the bankrupt had not made any payments upon her debt during the year and a half it had remained overdue, and having good reason to believe that she

had not been able to make any considerable reduction in the amount of her debt during that period; and she took these securities on such time and in such form as must necessarily break up the bankrupt's business, and must, if her mortgages were valid, give her a secured preference to the almost entire exclusion of all the bankrupt's creditors except herself and Stark, and those who had their debts secured on the bankrupt's real estate.

The natural, and, indeed, the inevitable effect of thus encumbering the bankrupt's whole property for the security of the debts of two favored creditors, under the circumstances already stated, was to give such creditors a fraudulent preference; and the creditors were bound to presume, as the law presumes, that the bankrupt intended the natural consequences and effect of her acts.

The facts already stated must be held sufficient to show that Mrs. Savage had reasonable cause to believe that these mortgages were executed with intentions, and under circumstances and conditions which rendered them fraudulent and void under the Bankrupt Act, without aid from the provision of the statute which makes them *prima facie* void, because not made and executed in the ordinary course of business. This *prima facie* evidence was alone sufficient to put the party on inquiry, and taken with the other facts before referred to, must be held conclusive against the validity of these securities. See *Haughey* v. *Albin*, 2 N. B. R., 129 *quarto*, 399 *octavo*; *Foster* v. *Hackley*, *Ibid.*, 406; *Grow* v. *Ballard*, *Ibid.*, 194; *White* v. *Raftery*, 3 *Ibid.*; *Ahl et. al.* v. *Thorner*, *Ibid.*, 118.

If De Lancey Martin must not be considered as having acted as the agent of Mrs. Savage and the respondent, Stark, as well as of the bankrupt, in the giving and receiving of the mortgages in controversy (which is a question not free from doubt), there is, perhaps, more difficulty in regard to the mortgage executed to the respondent, Stark.

In the case of Stark, the mortgage was given without his urging its execution or even asking for security; and, as he testifies, and all the evidence shows, it was given mainly for

the benefit of the brother-in-law of the bankrupt, who was liable as indorser for nearly the whole of Stark's debt. And this brother-in-law, it is shown, had been urgent in endeavoring to procure security against his indorsement.

Stark was a banker, and had for some years received from time to time a note of the bankrupt for one thousand dollars, in renewal of a note of the same amount previously discounted by him, properly taking care to have its ultimate payment secured by the indorsement of the brother-in-law, Bridgen, who was considered responsible. The bankrupt kept her bank account with Stark, and that account had been overdrawn, for a short time, to the extent of one hundred and eleven dollars and upwards. Demands against the bankrupt had been sent to Stark's bank for collection, and some had been returned unpaid. The mortgage was executed to him, and apparently for his security; but regarding himself as entirely secure, by reason of Bridgen's indorsement, he seems to have given the matter but little thought. He, however, testifies that he supposed the real object in giving the mortgage was to benefit Mr. Bridgen, as he (Stark) had no fears about his debt; that he supposed he authorized Mr. Brown, who drew the mortgage, to draw it; and that he gave him the amount of his account. He swears he did not, at that time, know that Martin was giving security to Mrs. Savage, but Brown, who acted for him, and took the particular security under such general authority or instruction as he had given him, knew it was to be, or had been, given. He also testifies that he made no inquiry of Mr. Martin in respect to the state of the bankrupt's affairs; and that he understood the mortgage was taken for the benefit of Mr. Bridgen, so far as the note of one thousand dollars was concerned.

The mortgage was given nearly a month before the one thousand dollar note was due, without Stark having asked for such security; it covered the whole of the bankrupt's personal property; it apparently transferred the whole legal title of that property to the mortgagee, leaving only an equitable right of redemption, which right of redemption the creditor could foreclose by a sale after the forfeiture, which took place the day

after its execution; it was not given in the ordinary course of business, and was for that reason presumed to be fraudulent and void, under the provisions of the 35th Section of the Bankrupt Act.

The respondent, Stark, is, I think, chargeable with notice of the mortgages to Mrs. Savage, executed at the same time with his own; and these mortgages, taken together, were fraudulent, and an act of bankruptcy on their face. They were in substance conveyances of the whole property of the bankrupt, and if enforced according to their terms, nothing was likely to be left for her unsecured creditors. In respect to the property of an insolvent, it may properly be said—to use the language of Lord Mansfield in *Worsley* v. *Mattos* (1 Burrow, 467):—"A conveyance of a part may be public, fair, and honest, but a conveyance of *all* must either be fraudulently kept secret, or produce an immediate absolute bankruptcy." This language is strictly applicable to the present case, and the language of the same judge, in *Wilson* v. *Day* (2 *Ibid.*, 827,) might with slight variation be used in this case. Lord Mansfield there said: "This deed is an act of bankruptcy itself. It defeats the whole Bankrupt Law; nothing remains for the creditors in any shape, but the whole property is put into the hands of his own trustees; therefore, of course, he is a bankrupt the moment he has executed the deed; for there is nothing at all left for his creditors." See *Grow* v. *Ballard*, 2 N. B. R., 69 *quarto*, 194 *octavo*, and authorities there cited.

The utility and the justice, not to say the necessity, of the provision which renders securities, etc., given out of the ordinary course of business, *prima facie* fraudulent, is well illustrated by the present case. This *prima facie* evidence is present to every creditor who accepts a security in any case to which the provision is applicable; and unless the creditor has evidence sufficient to repel this legal presumption, he has reasonable cause to believe that the security is fraudulent and void under the Bankrupt Act. This will necessarily prevent any security, voluntarily given by an insolvent to a favored creditor, from being held valid, simply because it proceeded from the volun-

tary act of the debtor, and was prepared and delivered without any previous communication with the creditor, either in regard to the giving of the security or the financial condition of the debtor. If a debtor can effectually secure any favored creditor by this one-sided and unusual mode of proceeding, it is likely to be resorted to in every case where the creditor (in consequence of a previous understanding with his debtor, or of the debtor's known disposition to secure him against loss, to the prejudice of his other creditors), is willing to rely upon the favorable disposition of his debtor, and to be willfully ignorant of his financial condition; and the salutary provisions of the Bankrupt Act, which were intended to invalidate the unjust preferences, and to prevent all the other frauds growing out of the validity of general or partial assignments for the benefit of particular creditors, would be evaded and defeated with ease and certainty. This case shows the propriety of the provision, and the manifest duty of this court to give to it the effect which it was the intention of Congress should be given to it.

A creditor cannot, by shutting his eyes when this statutory *prima facie* evidence of fraud is to be placed before him, escape the consequences of this provision. When he accepts a security, he is conclusively presumed to know what appears upon its face, and to have reasonable cause to believe it was intended to accomplish what must be its ordinary and necessary effect; and no "masterly inactivity," no self-imposed ignorance of what the circumstances call upon him to ascertain, however intense and however closely guarded and carefully cherished that ignorance may be, can make fraudulent preferences, like those attempted to be given in this case, valid and binding, as against the assignee of a bankrupt, while the 35th Section of the Bankrupt Act remains in force.

Independent of the provisions of that section, the circumstances of the case were sufficient to put Stark upon inquiry. *In re* Hunt, 2 N. B. R., 166 *quarto*, 539 *octavo*. *In re* Wright, *Ibid.*, 490, and such circumstances and such provisions must be held to render his mortgage invalid.

But it was urged that these securities were not void because

the bankrupt, long before the securities were given, and at the time of the loans by Mrs. Savage and of Bridgen's indorsement, promised to give security when required, and executed the mortgages in fulfillment of such promises under pressure from the mortgagees.

This position cannot be maintained. The provisions of the Bankrupt Act embrace *payments* for the purpose of giving preference, as well as to the giving of securities, etc., and it would hardly be contended that a preference by way of payment, otherwise invalid, could be valid because the debtor had agreed to pay the debt at the time it was contracted. Besides, the maintenance of the doctrine contended for would defeat the purposes of the Bankrupt Act. It would be easy in every case where it was desired to give a fraudulent preference to a relative or other favored creditor to make such a contract for security when called for; and such agreements would be in effect secret liens upon the property of the debtor, and enable him to effect the objects generally effected before the Bankrupt Act, under promises to secure relatives and indorsers against loss in any event, by assignments made for the benefit of such favorite creditors. A preference gained by a creditor, through the acts and co-operation of his debtor, is no less fraudulent and invalid because it was strongly urged upon his debtor. (See *Atkinson* v. *The Farmers' Bank*, Crabbe's Rep., 529; *Shawhan* v. *Merritt*, 7 Howard, 641.)

In addition to the objections to these chattel mortgages which have already been stated, it was insisted that they were fraudulent and void under the laws of this State. There was no immediate or continued change, or indeed any change, of possession, for some four months after their execution; and the circumstances of the case tend rather to support than to repel the legal presumption of fraud afforded by the continued possession of the mortgagor. But the conclusions already reached render it unnecessary to decide whether these mortgages were void under the laws of the State, or whether the assignee in bankruptcy, appointed under proceedings commenced after possession of the mortgaged property was taken by the mortga-

gees, can avail himself of the fact that there was no such immediate or continued change of possession.

A decree must be entered for the petitioner, unless the matter is otherwise arranged by the parties; and the terms of the decree must be settled on the application of the petitioner, after eight days' notice to the respondents' attorneys of the time and place when and where a draft decree will be presented for settlement; and a copy of the decree proposed must be served with such notice.

Charles G. Judd, Esq., for assignee in bankruptcy.

D. Morris, Esq., for Stark.

D. B. Prosser, Esq., for Mrs. Savage.

UNITED STATES DISTRICT COURT—DISTRICT OF NEVADA.

1. *Held*, when a man's property is taken on legal process against him, that if all his property were sold, and would not produce money enough to pay his debts, that he is insolvent within the meaning of the law.
2. *Held*, that a solvent man is one that is able to pay all his debts in full as they become due.
3. That it is the duty of one who is insolvent to apply to the Bankrupt Court in his own behalf, and if he does not, and some of his creditors take his property under legal process, he may be held to have suffered his property to be taken, and may be adjudged a bankrupt at the instance of creditors whose claims have not been provided for.

In re J. L. Wells.

Judge A. W. Baldwin charged the jury in this case as follows:

Gentlemen of the Jury: This is an application by McDonnell and Wood to have J. L. Wells adjudicated a bankrupt under the provisions of Section 39 of the National Bankrupt Act.

The petitioners allege that Wells, being insolvent, did, on the 12th day of October, 1869, suffer his property to be taken on legal process, at the suit of one McCausland, with the intent thereby to give a preference to the said McCausland, and to delay and to defeat the operation of the Bankrupt Act.

The respondent pleaded the general issue to the petition, the

effect of which is to present the facts involved for our determination.

These facts are: That on the 12th day of October, 1869, McCausland, in his own behalf, and as assignee of certain other creditors of Wells, instituted in one of the State courts an attachment suit against him, by virtue of which the sheriff has taken, and holds, all his property. It has been further proven that upon the day above mentioned the entire property of the respondent, if subjected to forced sale, would not have been sufficient to pay his debts.

The first question which arises in the case is, as to the fact of Wells' insolvency upon the 12th day of October instant—the day when his property was taken by the sheriff.

If you believe from the evidence that Wells' property, if sold on that day, would not have produced enough money to pay his debts, then I charge you, as a matter of law, that he was insolvent, within the meaning of the Bankrupt Act.

"A solvent man is one that is able to pay all his debts in full, at once or as they become due. Insolvency is merely the opposite of solvency. A man who is unable to pay his debts out of his own means, or whose debts cannot be collected out of such means by legal process, is insolvent; and this, although it may be morally certain that with indulgence from his creditors in point of time, he may be ultimately able to satisfy his engagements in full. The term insolvency imports a present inability to pay. The probable or improbable future condition of the party in this respect does not affect the question. If a man's debts cannot be made in full out of his property by levy and sale on execution, he is insolvent within the primary and ordinary meaning of the word, and particularly in the sense in which the word is used in the Bankrupt Act." (Burrill on Assignments, 38, 41; 4 Hill, 652; 13 How., 67; *In re* Lewis & Rosenheim, 1 N. B. R., 146 *quarto*, 449 *octavo*; 2 *Ibid*, 409.

Did the respondent "suffer" his property to be taken upon legal process, with intent to give a preference to the attaching creditor, or with intent to delay or defeat the operation of the Bankrupt Act? It is claimed by the respondent, and indeed

it sufficiently appears from the evidence, that there was no collusion between his attaching creditor and himself. From all that appears from the evidence, Wells did nothing to influence the issue of the attachment by McCausland. But for all that, he did, I think, "suffer" his property to be taken on legal process, within the meaning of the act.

That voluntary action on the part of the insolvent is not requisite to bring him within the effect of the act, is shown by the whole context of Section 39. For instance, among the various acts of bankruptcy enumerated in that section is being imprisoned for debt for more than seven days, than which it is difficult to conceive a more involuntary proceeding. The fact is, that the Bankrupt Act was designed to compel a fair distribution of an insolvent's estate amongst all his creditors—and, under the act, it is the duty of one who is insolvent to apply to the Bankrupt Court in his own behalf. If he does not so apply, and some of his creditors take his property under legal process, he may be held to have suffered his property to be taken, and may be adjudicated a bankrupt at the instance of creditors whose claims have not been provided for. Entertaining this view of the law, I charge you that Wells did "suffer" his property to be taken under process of law. It is urged that he did not so suffer it to be taken, with the intent to prefer the attaching creditor, or with the intent to delay or defeat the operation of the Bankrupt Act.

Upon this point I find the gist of the authorities so tersely and clearly stated in the *American Law Review* for April, 1869, p. 539, that I give you the text in charge: "If an insolvent debtor suffers his property to be taken on legal process, so that the natural and probable result will be to give a creditor a preference, he will be presumed to have intended to give such a preference; and if he could have prevented the taking by filing his voluntary petition in bankruptcy, and has not done so, he must be held to have 'suffered' the property to be taken within the meaning of Section 39"—citing numerous authorities.

In this case Wells must have known that he was insolvent

within the meaning of the act, as I have explained it to you; nor is it pretended that he did anything to prevent the taking of his property at the suit of McCausland. He must be held, therefore, to have suffered his property to be taken on legal process, with the intent to prefer one of his creditors, and with the intent to defeat the operation of the Bankrupt Act.

See *Avery* v. *Johann*, 3 N. B. R., 144 *octavo*; *In re* Randal & Sutherland, 3 N. B. R., 20 *octavo*.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where a creditor received a preference, having reasonable cause to believe that the bankrupt was insolvent when it was made, but afterwards voluntarily surrendered to the assignee in bankruptcy all the property and accounts received by the preference, and then proved his debt against the estate in bankruptcy, counsel for assignee moved to strike out such proof of debt.

Held, the creditor was entitled so to prove his debt. Motion denied.

In re HENRY B. MONTGOMERY.

THIS is a case of involuntary bankruptcy. Richard P. Burhaus, the assignee in this matter, applied for an order for the examination of Baldwin Griffin, a supposed creditor of the above-named bankrupt, who had proved and filed his claim against the above bankrupt.

An order was duly issued on such application, and the said Griffin appeared before the undersigned and submitted to such examination.

It appeared, on the examination, that the bankrupt had been a merchant at Prattsville, in Greene county, and that on the 9th day of January, 1869, he executed a bill of sale to Griffin of all the goods in the store and of the books of account of said Montgomery against his customers.

The stipulated consideration was nine thousand dollars, from which was to be deducted two thousand one hundred and sixty-eight dollars and forty cents, alleged to be due from Montgomery to Griffin, and the residue was to be paid on various

notes and other debts of Montgomery, some twenty-three in number, and which are set out in the bill of sale. Griffin is a brother-in-law of Montgomery, and had been a clerk in his store, and the evidence leaves no doubt upon my mind but that Griffin knew at the time he accepted the bill of sale and the property therein specified, that Montgomery was insolvent, and that this sale was designed to give him, Griffin, and the creditors mentioned in the bill of sale, a preference over the other creditors of said Montgomery. This transaction constituted one of the grounds upon which Montgomery was adjudicated a bankrupt. Griffin voluntarily surrendered to the assignee the property and accounts which he had received under the bill of sale.

On this state of facts the solicitor for the assignee moved to strike out the claim proved by Baldwin Griffin, and that such claim be disallowed on the ground that Henry B. Montgomery, the bankrupt, being insolvent, or in contemplation of insolvency, on or about the 9th day of January, 1869, made a sale of his goods, chattels, property and estate to the said Baldwin Griffin, of great value, to wit: of the value of nine thousand dollars, with intent to give a preference to one or more of his creditors, or one or more persons who might become liable for him as indorsers or security, in fraud of the Act of Congress to establish a uniform system of bankruptcy throughout the United States, passed March 2, 1867.

That said Montgomery was, by reason of said sale, among other things, afterwards, and on or about the 20th day of February, 1869, duly declared a bankrupt in and by the United States District Court for the Southern District of New York, on the petition of one or more of his creditors, and that the said Baldwin Griffin, at the time of such transfer, had reasonable cause to believe that a fraud on said act was intended, or that said Montgomery was insolvent. Also that said Griffin, since said Montgomery was declared bankrupt as aforesaid, has surrendered to the assignee the property conveyed under said transfer, and accounted for the property sold by him and money collected by him, being part of said property and estate

conveyed to him by said Montgomery, thereby acknowledging that said transfer was made to him, with knowledge on his part that a fraud was intended on said act, or with like knowledge that said Montgomery was, at the time of said transfer, insolvent, and that, for the causes aforesaid, said Griffin is not permitted to prove or have allowed his said claim.

In answer to this motion, the solicitor for Mr. Griffin makes the following points:

First. "There is no proof that Mr. Griffin had any reasonable cause to believe that, on taking such payment or conveyance, a fraud on the Bankrupt Law was intended. Nor is there any proof that he had reasonable cause to believe that Montgomery was insolvent.

Second. "It appears from the evidence and from the motion now pending, that Griffin has surrendered to the assignee all property, money, benefit and advantage received by him under the preference or transfer before alluded to, and that he is, therefore, entitled to prove his claim in any view of the case, in accordance with the provisions of Section 23 of the Bankrupt Law.

Third. "The motion is too late after the claim has actually been proven."

I think the decision of this question depends upon the construction that shall be given to the latter clause of Section 39 of the Bankrupt Act. Standing by itself, it seems to prohibit the proof of a debt in such a case as the one under consideration. But Section 22 provides that if a person shall accept a preference, having reasonable cause, etc., he may nevertheless prove his claim, and receive dividends, *if he surrenders to the assignee all property, etc.*, received by him under such preference. There have been a few decisions of questions involving a construction of these provisions of the Bankrupt Law, and they have proceeded upon different theories and have arrived at different conclusions upon almost identical facts. I have, therefore, sought to have the intention of the author of the law, and have received from the Honorable Thomas A. Jenckes, M. C., a letter, of which the following is a copy:

In re Smith.

WASHINGTON, *December* 8, 1869.

THEODORE B. GATES, Esq.

DEAR SIR:—The last clause of the 39th Section of the Bankrupt Act was intended to apply to cases in which the assignee was compelled to resort to legal process to recover the property, by defending which suit the creditor, who claimed to retain the property, would make himself party to the bankrupt's fraud, if any.

I do not see that it is inconsistent with the provisions of the 23d Section, by which a creditor, holding any of the bankrupt's property, can remove the stain of fraud by surrendering the property, and disclaiming all intent to become a party to the bankrupt's fraudulent proceedings.

I think Judge Fox, of Maine, and Judge Field, of New Jersey, have given opinions to this effect upon these clauses.

Respectfully yours,

T. A. JENCKES.

I adopt this construction, and recommend that an order be entered denying the motion of the assignee's solicitor.

THEODORE B. GATES,
Register in Bankruptcy.

BLATCHFORD, J.—The construction given by the Register to the 23d and 39th Sections of the act is the correct one, and the motion of the assignee should be denied.

The clerk will certify this decision to the Register, Theodore B. Gates, Esq.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

An insolvent debtor executed two chattel mortgages to secure pre-existing debts, and afterwards made a general assignment without preferences for the benefit of all his creditors.

In his answer to petition against him in involuntary bankruptcy, he denied having committed an act of bankruptcy, and denied that he knew or believed himself insolvent when he executed the said mortgages, though he made admissions in such answer that showed that he was legally insolvent, and that he knew the facts upon which the law adjudged him insolvent.

Held, such debtor is conclusively presumed to have intended the necessary effects of such general assignment, which would be to defeat provisions of the Bankruptcy Act. In making such general assignment he therefore committed an act of bankruptcy.

1913.R.9

In re SEYMOUR T. SMITH.—*Involuntary.*

HALL, J.—The first of the petitions filed in this case alleges as acts of bankruptcy the making of two chattel mortgages, one to Henry Tilton, and the other to the Genesee Valley National Bank, to secure the payment of pre-existing debts, the debtor and mortgagor being at the time insolvent, and executing the same with intent to give a preference to the said mortgagees over the other creditors of the debtor; and, also, the making of a voluntary general assignment of all the property of the debtor, for the benefit of his creditors, he at the time being insolvent, and making such assignment with intent to defeat the operation of the Bankrupt Act.

As the same acts of bankruptcy are alleged in the second petition, and with a fuller statement of the several transactions, and as the two petitions have been consolidated, the fuller allegations of acts of bankruptcy contained in the second petition will be taken as those upon which the questions presented in this case must be litigated.

This petition alleges as acts of bankruptcy: *First.* That the said Seymour T. Smith, the debtor, on the fourth day of November, 1869, being then insolvent, executed to Henry Tilton a chattel mortgage of all the merchandise, personal property, goods, and chattels in the debtor's store, for the expressed purpose of securing to said Tilton the payment of one thousand three hundred and ninety-nine dollars and sixty-eight cents, due and owing to said Tilton, with intent to give a preference to said Tilton over the other creditors of said Smith.

Second. That the said Smith, on the 6th of November, 1869, being insolvent, made to the Genesee Valley National Bank another chattel mortgage, upon substantially the same property, to secure (as expressed in said mortgage) the payment to the said bank of six hundred dollars, which, as stated in said chattel mortgage, was loaned and advanced to said Smith upon his promissory note, which had become due on the 20th day of

September, 1869, and that said mortgage was so made with the intent to give a preference to said bank over the other creditors of said Smith.

Third. That on or about the 20th day of September, 1869, the said Smith, being a merchant or trader, fraudulently stopped payment of his commercial paper, and had not resumed within a period of fourteen days; and that among said paper was the note to the Genesee Valley National Bank, mentioned in said chattel mortgage as aforesaid.

Fourth. That the said Smith, on the 11th day of November, 1869, being insolvent, and possessed of certain property, rights, and credits, as described, made assignment of all his property, of every name and description, to Moses H. Jewell, with the intent to defeat or delay the operation of the Bankrupt Act, and to hinder and delay the creditors of the said Smith of their just suits, and to prevent his property from being distributed according to the provisions of the said act.

Smith, the respondent, filed his separate answer to these petitions, but as the answer to the petition secondly above referred to is in substance like the answer to the first petition, so far as it relates to the allegations of acts of bankruptcy contained in the first, only the answer to the petition secondly referred to need be considered.

The respondent, Smith, by this answer, denies that he committed an act of bankruptcy by the making of the chattel mortgage to Tilton, or that to the Genesee Valley National Bank, as alleged in the petition. He then affirms, in respect to each of such mortgages, that it was executed in good faith to secure an honest indebtedness from the mortgagor to the mortgagee, to the amount secured by such mortgage; and expressly denies that he executed the same with the intent to give a preference to the mortgagee over other creditors. He then affirms that he then believed that he had property sufficient to pay all his debts, and intended to do so. He further alleges that both said mortgages were executed by him without any knowledge or belief that he was insolvent, and without intending to commit any fraud on the Bankrupt Act. He also

denies that he committed a further act of bankruptcy, as alleged in the petition, in that on or about the twentieth day of September last past, being a merchant or trader, he fraudulently stopped payment of his commercial paper; but, on the contrary, by reason of being unable to collect his debts, he could not meet such paper, but intended to, and believed he could, meet it soon thereafter; but that such intention was defeated by circumstances entirely beyond his control; and he adds an express denial that he had fraudulently stopped payment of his commercial paper. He also denies that he committed an act of bankruptcy in executing the general assignment set forth in the petition, and also expressly denies that "he executed the same with the intent to defeat or delay the operation of the said act, *and* to hinder or delay the creditors of him, the said Smith, of their just suits, *and* to prevent his property from being distributed according to the provisions of the said act."

In the conclusion of his answer the respondent "alleges and affirms that the said chattel mortgages were executed in good faith, as above stated, and because the creditors named therein requested security, and because he believed that he could give them such security without injustice to his other creditors, as he then believed he had the means to pay all his indebtedness, and that said assignment was executed without preferences, and for the sole purpose of having his creditors share equally in his property in proportion to their indebtedness."

On these answers being filed it was insisted by the petitioning creditors that they were entitled to an adjudication of bankruptcy against the respondent upon such answers, notwithstanding the denials and defensive allegations of the respondent. And in order to present the precise state of the case, a very full statement of the answers has been carefully made. Whether an act of bankruptcy was committed by the respondent, by the execution of either of the chattel mortgages, is a question which will not be discussed. It will be assumed, for the purposes of the present case, and in order to rest the adjudication of bankruptcy upon a different ground,

that the existence of the intention necessary to constitute the fact of such execution an act of bankruptcy, is sufficiently denied.

Nor will the case be disposed of upon the ground that the commission of an act of bankruptcy by the debtor, in stopping payment of his commercial paper, and failing to resume payment thereof within fourteen days, is substantially admitted by the answer, although the decision heretofore made in the case of *Wells*, 1 N. B. R., 171, is still recognized as the law of this court.

The remaining question relates wholly to the alleged act of bankruptcy by the execution of a voluntary general assignment of all the respondent's property for the benefit of all his creditors without preference, with the alleged intent to defeat or delay the operation of the Bankrupt Act, and to prevent his property from being distributed according to the provisions of the act.

In disposing of this question it will be considered as though the respondent's denial of an intention to defeat or delay the operation of the Bankrupt Act, and to hinder or delay his creditors, and to prevent his property from being distributed according to the provisions of the act, had been made in the disjunctive, and in such form as to fully deny either of the intentions thus imputed to him. The important question will then be, whether, under the admissions of the respondent, the law does not conclusively presume the intention to defeat or delay the operation of the Bankrupt Act, and to prevent the property assigned from being distributed according to the provisions of that act.

The insolvency of the respondent at the time this assignment was executed is not denied, and cannot be controverted. His whole stock in trade, if not the whole of his property, had been transferred or encumbered by two chattel mortgages within the week next preceding the assignment; and the assignment itself necessarily broke up the respondent's business, if this had not already been done by the chattel mortgages; and no creditor, except those he had preferred by his previous action, can re-

ceive any of the proceeds of his property, if this assignment be sustained, except as it may be converted into money and distributed by this assignee of the respondent's selection.

The execution of the assignment was the voluntary and deliberate act of the respondent, and there is no pretense that he did not understand its provisions, or that he did not know that the natural and necessary consequences of the execution of the trust thereby created would be to give to the assignee the entire control of the disposition of his property and the *pro rata* distribution of its proceeds.

If such an assignment be upheld in hostility to the creditors of an insolvent and bankrupt assignor, it necessarily and absolutely defeats the operation of the Bankrupt Act. It commits the disposition of the property of the bankrupt and the distribution of the property to an assignee selected by the debtor, and deprives his creditors of the right given them by the Bankrupt Act to choose an assignee for that purpose; it takes from the courts of bankruptcy the legal supervision and control—the legal and equitable jurisdiction—which they, under that act, are to exercise in respect to such property, and the hostile claims and adverse interests of the bankrupt's creditors, and the marshaling of his assets; as well as in respect to his conduct, property, and person; and it also defeats its operation in many other respects, by preventing the property assigned from being brought within the operation and protection of numerous minor provisions of the act, and within the protection of other provisions of great importance, the infraction of which are punished as heinous crimes.

There can be no possible doubt that the execution of the general assignment under the circumstances of this case was an act of bankruptcy; and the only question upon which there can be the slightest doubt is, whether, in the absence of any rebutting proof—and even in the absence of a replication to the respondent's answer—the denial of the intention imputed to him, and which is necessary to constitute the act of bankruptcy, must not prevent an adjudication until the question of intention has been submitted to a jury.

Every person of a sound mind is presumed to intend the necessary, natural, or legal consequences of his deliberate act. This legal presumption may be either conclusive or disputable, depending upon the nature of the act and the character of the intention. And when, by law, the consequences must necessarily follow the act done, the presumption is ordinarily conclusive and cannot be rebutted by any evidence of a want of such intention.

In such cases the oath of the defendant to an answer to a bill in chancery, though ordinarily sufficient to countervail the testimony of a single witness, without regard to the actual belief of the judge as to the truth of such testimony, is not sufficient to destroy such legal presumption, even in a case which is brought to a hearing upon bill and answer without the filing of any replication. Even fraud is thus conclusively presumed in certain cases.*

The doctrine of *Cunningham* v. *Freeborn* (which was heard on bill and answer alone), that the admission of facts which are *per se* fraudulent in law, are as much so and as conclusive upon the defendant as if he had in express terms admitted a fraudulent intent in his answer, and that in such case any subsequent disclaimer of intent will not avail him, was expressly approved in *Waterbury* v. *Sturtevant.*

In the former Mr. Chief Justice Nelson declared, in substance, that it could not be endured, in principle or practice, that the answer of a defendant disclaiming a fraudulent intent, though it admits facts from which such intent is a necessary or legal inference, shall still be conclusive upon this point.

In *Fiedler* v. *Day*, the court declared that it was of no consequence that the defendants denied all fraudulent intent, and that such a denial was of no avail when the answer admitted facts conclusively showing the fraud; and in *Robinson* v. *Stewart*, it was said to be a familiar rule that a positive denial of

* *Cunningham* v. *Freeborn*, 11 Wendell, 240; *Waterbury* v. *Sturtevant*, 18 Wendell, 353; *Fiedler* v. *Day*, 2 Sandford's Superior Court Rep's., 594; *Robinson* v. *Stewart*, 10 New York, 189; and see *Barney* v. *Griffin*, 2 Comstock, 365; *Collomb* v. *Caldwell*, 16 New York, 486.

fraud in an answer will not prevail against admissions, in the same pleading, of facts which show that the transaction was fraudulent.

General denials of fraud, and of fraudulent intent, in an answer, even when it is plain that such denial should not be made, seems not to be a hard thing for the conscience of the party, and if received as of the same force as the denial of specific allegations of distinct facts, the powers of courts would be too much cramped in the exercise of a salutary jurisdiction. *Waterbury* v. *Sturtevant*, *ubi supra*. And to give to the denial of intent in cases like the present the effect insisted upon by the defendant's counsel, would be productive of useless and expensive litigation, of frequent perjury and gross injustice.

In the present case the answer denies, upon the party's own personal knowledge, and, equally, in the most absolute terms, the conclusion of law that he had committed an act of bankruptcy, the absence of the intent imputed to him, and other allegations of specific facts in respect to which a direct denial, of his own knowledge, may be proper. In like manner he denies that he knew or believed himself to be insolvent when he gave the chattel mortgages before referred to, although the admissions in the answer show that he was legally insolvent, and that he knew the facts upon which the law judged him insolvent. But it must in charity be presumed, and probably in accordance with the fact, that he was ignorant of the legal definition of the term insolvency, and that such ignorance led to such denial.

It may, perhaps, be proper to consider the argument that the provisions of the Bankrupt Act should not be so construed as to impute to Congress an intention to invalidate a voluntary assignment without preferences, under which the property of an insolvent will be distributed *pro rata* among his creditors, and perhaps, more expeditiously and with less expense than it can be done under proceedings in bankruptcy.

That the provisions of the Bankrupt Act fully authorize, if they do not absolutely require such construction, is very clear; and this case furnishes a sufficient reason for the adoption of

such provisions. Unless the creditors can proceed in bankruptcy, the chattel mortgages by which preference has been given to certain creditors of the bankrupt cannot be set aside on the ground of such unlawful preference, and an insolvent, by giving preference in that mode, and then making a general assignment without preferences, could defeat some of the most salutary provisions of the Bankrupt Act.

An adjudication of bankruptcy will be ordered, and the case referred to Register Husbands for further proceedings.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

The taking of property by a receiver appointed by order of a State court, is a taking under legal process, within the meaning of Section 39 of the Bankruptcy Act.

In the matter of the Petition of MILTON J. HARDY *and others, for an adjudication of bankruptcy against* ABRAHAM B. CLARK AND ABRAHAM BININGER.

CHARGE OF JUDGE BLATCHFORD TO THE JURY.

THE 39th Section of the Bankruptcy Act provides that any person residing within the jurisdiction of the United States, and owing debts provable under the act, exceeding the amount of three hundred dollars, who, after the passage of the act, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall procure or suffer his property to be taken on legal process, with the intent, by such disposition of his property, to defeat or delay the operation of the act, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions thereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, the aggregate of whose debts, provable under the act, amounts to at least two hundred and fifty dollars. The condition is then prescribed by the same section, that the petition shall be brought within six months after the act of bankruptcy has been committed.

In the present case it is alleged in the petition that Abraham B. Clark and Abraham Bininger, composing the firm of A. Bininger & Co., have, for the period of six months preceding the date of the filing of the petition, resided and transacted business at the city of New York; that the petitioner's demand is provable against them, in accordance with the Bankruptcy Act; that they owe debts to an amount exceeding the sum of three hundred dollars; and that the petitioner's demand exceeds the sum of two hundred and fifty dollars. The debts due to the petitioners are then set out, being the two promissory notes which have been proved in evidence. The petition then avers that, on or about the 19th day of November, 1869, which was within six months prior to the bringing of the petition, the said Abraham B. Clark and Abraham Bininger, being bankrupt and insolvent, and in contemplation of bankruptcy or insolvency, did procure and suffer their property to be taken on legal process, to wit, under and by virtue of an order made by one of the justices of the Superior Court of the city of New York, appointing one Daniel H. Hanrahan Receiver of all the property and effects of the said firm of A. Bininger & Co., and which said order was procured by the said Abraham B. Clark to be made in an action in the said court, wherein the said Abraham B. Clark was plaintiff and the said Abraham Bininger was defendant, and that the said Receiver was suffered to take possession of said property under said order, with the intent, by such disposition of their property, to defeat and delay the operation of the said Bankruptcy Act. These allegations are directly within the language of the act.

As to the existence of formal facts necessary to confer jurisdiction on this court—the residence of the debtors within the jurisdiction of the United States, the owing by them of the required amount of indebtedness, and the presentation of the petition by creditors holding the required amount of indebtedness, to the proper court, and within the six months after the commission of the alleged act of bankruptcy—there is no dispute. There remain only three questions for consideration: (1.) Were Clark and Bininger insolvent when they committed

the alleged act of bankruptcy? (2.) Did they procure or suffer their property to be taken on legal process? (3.) Was the act complained of done with the intent, by such disposition of their property, to defeat or delay the operation of the Bankruptcy Act?

The word "insolvency," as used in the Bankruptcy Act, as it has been interpreted, I believe, by all the judges of the Courts of the United States who have passed upon it, means, when applied to traders such as these debtors were, simply this —an inability to pay debts as they mature and become due and payable, in the ordinary course of business, as persons carrying on trade usually do, in that which is made, by the laws of the United States, lawful money and a legal tender to be used in the payment of debts, without reference to the amount of the debtor's property, and without reference to the possibility or probability, or even certainty, that, at a future time, on the settlement and winding up of all his affairs, his debts will be paid in full out of his property. (*Bayly* v. *Scofield*, 1 Maule and Selwyn, 338; *Thompson* v. *Thompson*, 4 Cushing, 127, 134; *Lee* v. *Kilbourne*, 3 Gray, 594, 600; *Herrick* v. *Borst*, 4 Hill, 650, 657; *Barnard* v. *Crosby*, 6 Allen, 327, 331; *Buckingham* v. *McLean*, 13 Howard, 167; *Merchants' National Bank* v. *Truax*, 1 N. B. R., 545; *In re* Gay, 2 *Id.*, 358.) Under the 11th Section of the act, which provides for petitions in bankruptcy by debtors, all that is necessary to enable a debtor to become a voluntary bankrupt is, that he shall reside and owe debts as therein required, and shall apply, by petition addressed to the proper judge, setting forth his inability to pay all his debts in full, his willingness to surrender all his estates and effects for the benefit of his creditors, and his desire to obtain the benefit of the act. This inability to pay debts, mentioned in the 11th Section, is the same thing as the insolvency mentioned in the 39th Section. It means the inability of the debtor, then and there, to pay accruing debts, as they mature, in the ordinary way, in the usual course of the business of trade, in that which is made by the law of the United States a lawful tender in the payment of debts. Nothing else is a legal tender in payment

of debts but that which is declared by the law of the United States to be lawful money and such legal tender. Property is not a lawful tender in payment of debts, and a debtor has no right to pay a debt with property of any kind. Therefore, the amount of the trader's property is of no consequence, if such inability exists to pay matured debts in such lawful money.

In this case, the evidence on the question of insolvency all points to one conclusion. Mr. Clark testifies, not merely that he and his firm had not, on and after the 4th of November, 1869, and down to and including the 19th of November, 1869, the lawful money wherewith to pay the debts of the firm as they matured, but that, after the most earnest and strenuous efforts, he and the firm were unable to obtain such lawful money. Being so without it, he and his copartner and the firm were insolvent. On the 19th of November the business of the firm as traders was stopped and broken up, and their whole property was put into the hands of a Receiver on that day. Under such circumstances, Mr. Clark would have had a right to present a voluntary petition to this court, under the 11th Section of the act, either without or in conjunction with his copartner, setting forth the inability of the copartners to pay all their debts in full, notwithstanding he or they might have thought that, in the end, such debts would be paid in full out of the property of the debtors. The evidence being all one way, and there being no dispute about the fact of insolvency, on the law as above defined, it is the duty of this court to hold that there is no question of fact for the jury, as to whether the debtors were insolvent or not on the 19th of November. (*Schuchardt* v. *Allens*, 1 Wallace, 369.) It is perfectly clear that they were then insolvent.

The second question is, as to whether the debtors procured or suffered their property to be taken on legal process on the 19th of November. The debtor Bininger, by making no answer to the petition, confesses its allegations. As to the debtor Clark, there is no disputed question of fact on this branch of the case. It appears in evidence, from the written complaint filed by Mr. Clark, in the suit brought by him in the Superior

Court of the city of New York against his copartner Bininger, and which is verified by him, that he prayed that court, in such complaint, that a Receiver of the property, rights and good-will of said partnership might be appointed, with power to dispose of the same for the benefit of all parties entitled thereto, and that the proceeds thereof might be divided among the partners, after the payment of all just debts of such partnership. This was a prayer to the said court, on the part of Mr. Clark, to take possession of the property of the partners by legal process. This action was followed up by an order made by the said court, on the 19th of November, directing that Daniel H. Hanrahan be appointed Receiver of all the debts, property, equitable rights and things in action belonging to said partnership, with power to dispose of the same for the benefit of all parties concerned, according to law. It further appears in evidence, that such Receiver complied with the requirement of such order, that he should execute and file an official bond, upon doing which he was to be invested with all the rights and powers of his Receivership. It also appears, that he has actually taken possession of said property under the order. Such order is legal process. It is process for the taking of property, issued in a legal proceeding, as much as an attachment or an execution. The fact that the Act of Congress, the paramount law of the land, enacted under the authority of the Constitution of the United States, which all judicial officers, Federal and State, are bound and sworn, by oath or affirmation, to support—the fact that the Bankruptcy Act makes, in broad terms, the procuring or suffering property to be taken on legal process, with certain attendant circumstances, an act of bankruptcy, shows, that the circumstance that the property is taken on legal process issued out of a court of a State, furnishes no ground for withholding an adjudication of bankruptcy. On the contrary, in view of the well-known fact, that the mass of civil legal process is issued out of the courts of the States all over the United States—courts of Justices of the Peace and courts of Record—and that the amount of property taken on civil legal process issued out of the Federal Courts is

comparatively very small, it is evident that Congress intended to say, that the taking of property on legal process issued out of a court of a State is an act of bankruptcy, when accompanied by the other conditions specified in the 39th Section of the act. The property in this case was taken on the process. The process was issued by a court of justice, and was a legal and proper process. It carried on the face of it a right to the Receiver to take possession under it of the property named in it. It was, therefore, in the sense of the act, "legal process." There is, then, no question of fact to be submitted to the jury as to the second head of inquiry.

The next question is, as to the intent with which the procuring or suffering was done. To be within the 39th Section, it must have been an intent, by such disposition of their property, to defeat or delay the operation of the Bankruptcy Act. The matter of intent is illustrated by a familiar principle of law. Where an individual is charged with the offense of assault with a deadly weapon, with intent to kill, if it be shown that he knowingly and voluntarily pointed a loaded pistol at a vital part of another human being, the law declares that the natural, inevitable consequence of that act is to kill, provided the pistol is fired; and the individual cannot be heard to say that he had no intent to kill, the pistol being so pointed at a vital part, provided he had an intent, with such weapon so pointed, to fire it, and did fire it. The intent must be judged of with reference to the voluntary action of the individual. That is the true rule in all cases of the kind. In the present case, as the necessary and inevitable consequence of the transfer of the property referred to, to the Receiver, was to defeat the operation of the Bankruptcy Act in regard to that property, then, if the debtors voluntarily procured or suffered such property to be so taken on such legal process, when they were sane, when they were not under duress, when the procuring or the suffering was voluntary, the law conclusively presumes that they had the intent to defeat the operation of the Bankruptcy Act. This must be so; otherwise, no laws, civil or criminal, could be administered. Every person is presumed to intend the natural

and probable consequences of his own acts, and, if it be shown that the consequences naturally follow the acts, it is competent to infer the intent, in doing the acts, to effect such consequences. (*Denny* v. *Dana*, 2 Cushing, 160, 172; *Beals* v. *Clark*, 13 Gray, 18, 21.) The rule is thus stated by Judge Hall, of the Northern District of New York, in the recent case of *In re* Smith, decided December 15, 1869, 3 N. B. R., 98 *quarto*, 000 *octavo:* "Every person of a sound mind is presumed to intend the necessary, natural, or legal consequences of his deliberate act. This legal presumption may be either conclusive or disputable, depending upon the nature of the act and the character of the intention." And when, by law, the consequences must necessarily follow the act done, the presumption is ordinarily conclusive, and cannot be rebutted by any evidence of a want of such intention. There are many decisions by the courts of the State of New York, to the effect that notwithstanding the denial of an intent to commit a fraud or to produce a forbidden result, such intent will often be conclusively presumed. (*Cunningham* v. *Freeborn*, 11 Wendell, 240; *Waterbury* v. *Sturtevant*, 18 *Id.*, 353; *Fiedler* v. *Day*, 2 Sanford's Superior Court Rep., 594; *Robinson* v. *Stewart*, 10 New York, 189; *Barney* v. *Griffin*, 2 Comstock, 365; *Collomb* v. *Caldwell*, 16 New York, 484.) In the present case, the denial by Mr. Clark of an intent to defeat or delay the operation of the Bankruptcy Act is of no consequence, provided he had the intent to procure the appointment of the Receiver, and procured such appointment, and suffered the property to be taken by such Receiver, and did these things knowingly and while he was sane and not under duress. If so, then the law conclusively presumes that he had the intent to effect the result which would necessarily and inevitably follow. That result was a defeating of the operation of the Bankruptcy Act in respect to such property, if the Receivership over it should remain undisplaced.

On the question of intent, the evidence is, that Mr. Clark signed and verified, and caused to be presented, the complaint in the State court, containing the prayer to which I have re-

ferred. This, followed by the appointment of the Receiver, and by his taking possession of the property, would certainly bring Mr. Clark within the category of suffering the property to be taken on legal process, if it did not bring him within the category of procuring it to be so taken. Mr. Bininger confesses, by his default, that he suffered it to be so taken. The suspension of payment by the firm occurred on the 4th of November, and the Receiver was appointed and took possession of the property on the 19th of November. It appears, therefore, that the period of fifteen days elapsed between the time when the firm became insolvent and the time when its property was taken on the legal process. Mr. Clark testifies that the proceeding for the appointment of a Receiver was taken with his knowledge and consent, and that he was told that the Receiver would take possession of the property of the firm. The evidence is conclusive that Mr. Clark knew what he was doing, and was of a sound mind, and did not act under any duress. Under such circumstances, the Bankruptcy Act is plain in its requirements. When a merchant or trader is insolvent, that is, unable to pay his debts, as they mature, in the ordinary course of business, as the term "insolvency" has been interpreted to you by the court, it is his duty to come at once into the Bankruptcy Court, under the protection of this law, and submit his property to that court for adjudication and distribution, and a mode is provided by the act for bringing in his copartner who will not come in voluntarily.

It follows, therefore, that there is no question of fact to be submitted to you in this case. On the law, as applicable to the undisputed facts, I can perform my duty in no other way than to direct you to render a verdict for the creditors as to the act of bankruptcy to which I have directed your attention, namely, that these debtors, being insolvent, did, on the 19th of November, 1869, suffer their property to be taken on such legal process, with the intent, by such disposition of that property, to defeat the operation of the Bankruptcy Act of the United States, and it is your duty to render such verdict. I direct that verdict accordingly.

The jury, in accordance with such direction by the court, rendered a verdict for the creditors, as to the act of bankruptcy referred to.

F. N. Bangs, for the creditors.

M. Compton and *J. F. Morgan*, for Clark.

UNITED STATES DISTRICT COURT—MAINE.

A firm had notes past due and falling due without available means to meet them, and obtained loans for the purpose from parties liable on certain of the firm notes and private notes of the members, giving two new notes for the loans so obtained, and securing payment thereof by executing a mortgage of all the firm property. The firm was subsequently adjudged bankrupt, on the petition of a creditor in involuntary bankruptcy, and assignee in bankruptcy brought action in equity to set aside said mortgage as constituting a fraudulent preference under Section 35 of the Bankrupt Act. The mortgagees swore that they believed the firm to be solvent at the time such mortgage was executed, and a member of the firm swore that he believed the same, and had not then contemplated insolvency or bankruptcy.

Held, the firm was actually insolvent when the said mortgage was executed, and the mortgagees had reasonable cause so to believe it, and it operated to give such preference. The mortgage must accordingly be set aside as void.

JOHN Q. SCAMMON, *Assignee of* CHADBOURNE & NOWELL, *v.* THOS. H. COLE AND EDWARD H. C. HOOPER.

FOX, J.—This is a bill in equity, brought by the assignee of the bankrupts, to set aside a mortgage of their stock in trade, fixtures, tools, baggage-wagon and pung, made by them to the respondents on the 17th of June, 1868, to secure the payment of their notes of that date, one given to Cole for twelve hundred and seventy-two dollars and fifty cents, and one to Hooper for fifteen hundred and forty-seven dollars and sixty-one cents, payable on demand with interest.

Chadbourne & Nowell were furniture dealers at Biddeford, and were adjudged bankrupts on the petition of one of their creditors, filed on the 11th of July, 1868. This mortgage covered all the firm estate excepting one house, which was not subject to attachment by the laws of this State; and as a part of the same transaction, Chadbourne at the same time mort-

gaged to the respondent all his real estate, to secure the payment of these notes. Nowell is not shown to have had any separate estate. The value of the property in question does not definitely appear. All the evidence on this point is from Chadbourne, who states, that a few days after the execution of the mortgage they took an account of stock, and that their assets, including all demands due the firm, were six thousand six hundred and eighty-seven dollars.

It is claimed that this mortgage of the partnership estate was in fraud of the 35th Section of the Bankrupt Act.

The examinations of Chadbourne and of the respondents have been read in evidence by the complainant.

Chadbourne testifies: "The firm commenced business in 1864, each partner contributing one thousand five hundred dollars as capital. June 16th I informed Cole that the firm had some paper in the bank that was overdue, and they wanted to raise money to pay it, and asked his advice what to do. Cole inquired what we wanted to do, and I told him we thought of mortgaging our stock to raise some money. Cole said he would see Hooper, and thought he could arrange it. Cole said, 'If you will give *us* a mortgage on your stock of goods and on your real estate, we will assist you.' They asked how much I wanted to raise. I told them about three thousand dollars. They asked for what we wanted it; told them, to pay one thousand two hundred and fifty dollars to First National Bank of Biddeford, part of which was overdue and had Hooper's name on it—about seven hundred and fifty dollars then overdue, and five hundred dollars was falling due; that there was three hundred dollars, with Hooper's name on it, at the First National Bank of Saco; that we wanted five hundred dollars of it to pay *my* note to Gardner Libby, on which Cole and A. Jones were sureties, and which was overdue; that there was a note at the Savings Bank, given by Nowell, on which Cole and I were sureties, and that we owed Cole two hundred and fifty dollars for borrowed money. I think we told Cole we were liable to be called upon for these liabilities at any time, and that as we were going to mortgage our stock to raise some money, we

might as well get enough to pay this, so that we might go along in our business. Cole said, if we would give a mortgage of the stock and real estate, as we had proposed, they would furnish us with money to pay our liabilities. There was some conversation at the interview when the papers were made, in relation to our other liabilities. They inquired how much we owed in Boston. I replied that my partner told me that we owed about one thousand five hundred dollars—I may have said one thousand five hundred or two thousand dollars. I think they asked me if I knew how much we owed, and that I told them I did not know, but would ascertain. Hooper gave up the notes to me that were in the bank, one thousand two hundred and fifty dollars, and three hundred dollars in money. Cole paid note to G. Libby and interest, five hundred and twenty-two dollars, and now holds it; and also the note, in the Savings Bank, for five hundred dollars against Nowell as principal and Cole and myself as sureties. We gave a note to Hooper for one thousand five hundred and fifty dollars, and to Cole for one thousand two hundred and seventy-two dollars and sixty cents, both of which were secured by both mortgages. That note to Cole was to pay the two notes above-mentioned, and our indebtedness of two hundred and fifty dollars for borrowed money. The defendants did not know, to my knowledge, that we were unable to pay our liabilities as they became due, but they did know the notes in the bank were overdue and unpaid. The firm did not know that they were unable to meet their liabilities as they fell due. We made the mortgage to raise money to meet the notes which were due, and about coming due; did not give them this mortgage to secure a preference. The firm was then insolvent." On cross-examination he testifies: "We did not know, and had no reason to believe, we were insolvent at this time. We did not contemplate bankruptcy or insolvency, or expect to stop our business; did not know our condition until we took account of stock afterwards. We had two extensions from T. M. Holmes & Co. of Boston, last of 1867, and again about June 1, 1868; had several extensions from Boston creditors."

From a schedule annexed to Chadbourne's examination, it appears the firm was indebted over ten thousand dollars; but I do not find on this list the Libby note, or the note to the Savings Bank. These were, to be sure, individual liabilities, which, if added to this amount, would make their joint and several liabilities over eleven thousand dollars.

The 35th Section of the Bankrupt Law declares "that if any person, being insolvent or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, * * * makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such assignment, or conveyance, etc., having reasonable cause to believe such person is insolvent and that such conveyance is made in fraud of the act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited, * * and if such sale, etc., is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of fraud."

To invalidate the transfer it must appear that the debtor, at the time, was insolvent or in contemplation of insolvency, and that he intended to give a preference to a creditor, or person having a claim against him, or to one who is under a liability for him.

In this case Chadbourne admits the firm was deeply insolvent at the time the mortgage was given; but he avers that they were not aware that such was their condition until afterwards, when an examination was made as to their assets and liabilities, and it appeared that they could not pay more than twenty or twenty-five per cent. Chadbourne did not keep the books, and may not therefore have been so conversant with their real condition as a copartner, whose testimony is not before me, but who, I cannot but believe, was well aware of the insolvency of the firm.

In the determination of questions in bankruptcy, it must be remembered that "insolvency," as used in the bankrupt act, does not mean an absolute inability to pay one's debts at a future time, upon a settlement and winding up of all a trader's concerns; but a trader may be said to be in insolvent circumstances when he is not in a condition to pay his debts, in the ordinary course, as persons carrying on trade usually do. This definition has been substantially adopted by every District Judge in the country, before whom the question has arisen.

What was the situation of this firm on the 17th of June? Their assets of every kind, including all debts due to them, was a little under six thousand seven hundred dollars; and Chadbourne was also owner of his homestead, and a small lot adjoining. Their liabilities, individually as a firm, were in excess of eleven thousand dollars. A note, in the Biddeford Bank, of five hundred dollars, had been overdue for more than a week; another note of two hundred and fifty dollars, in the same bank, had been overdue some days, and both were renewals of former notes and were indorsed by Hooper, one of the respondents. The same bank had two other and similar notes, each for two hundred and fifty dollars, and the Saco Bank a similar note for three hundred dollars, all of which would soon fall due, and which Chadbourne admits they could not pay, excepting by a mortgage of their stock. Chadbourne's note of five hundred dollars was also due to Gardner Libby, on which Cole was surety; and there was a note of Nowell's for five hundred dollars, at the Savings Bank, on which Cole and Chadbourne were responsible, and for all which, as Chadbourne states, they were liable to be called upon at any time. They owed Cole two hundred and fifty dollars for borrowed money, one-half of which had been standing four or five months. They had also been obliged to apply to some of their general creditors for an extension of their liabilities, and twice in particular to their heaviest creditors, T. N. Holmes & Co., to whom they were at this time indebted one thousand and eighty dollars, being for two acceptances of two hundred and sixteen dollars each and a third of two hundred and sixteen dollars and seventy cents,

given June 12, 1868, in renewal of the following notes, which were given in settlement of merchandise accounts, to wit: one for two hundred and nineteen dollars and fifty cents, dated August 10, 1867, on three months; one for three hundred and twenty-three dollars and seventy-five cents, dated January 3, 1868, on four months; and one for eighty-three dollars, April 1, 1868, on four months; one draft for two hundred and six dollars, dated June 12, 1868, on three months, and one for two hundred and fifteen dollars and sixty cents, of June 20, the two last being given in settlement of accounts for merchandise. They had also renewed a note of Marret, Poor & Co.'s, of April 25, and to quote Chadbourne's language "they had applied to their Boston creditors several times for an extension of their notes and accounts during the year 1868, and prior to the 16th of June."

They were owing Joseph Dennett four hundred dollars for money loaned a year before, for which he held their note payable on demand; William O. Brown twelve hundred dollars for money loaned April 1, 1867, for which he had a similar note, and from their schedule it appears they were indebted to others to the amount of about twelve hundred dollars for money borrowed by them at various times, some as far back as December, 1867. There were also two notes held by the banks for three hundred and fifty dollars, but as neither of the respondents were answerable upon them, these notes were not paid or secured.

These facts satisfy me, notwithstanding the statements of Chadbourne, who may not have had a clear understanding of the legal definition of insolvency, that they could not but be aware, at this time, of the firm's being insolvent. Twelve hundred and fifty dollars of their paper, on which the respondents were liable, was then overdue and unpaid. A large amount of borrowed money was due to other parties, which they were liable to be called upon to discharge at any moment, and none of which could they meet, excepting by the suicidal course of mortgaging their stock in trade. They had obtained several extensions of their business liabilities, especially from Holmes

& Co., one of whose notes for two hundred and nineteen dollars and fifty cents had remained overdue and unpaid from the 10th day of the preceding November until the 12th day of June, only five days before this mortgage was executed, when it was taken up and included in new drafts given in extension, together with another note of three hundred and twenty-three dollars and seventy-five cents, which fell due May 3d, and remained unpaid until included in these drafts.

Their business for more than six months had not "been carried on as traders usually do business;" their business notes were overdue and unpaid; they owed more than two thousand dollars, for borrowed money, some of it due for more than a year: their bank liabilities were also overdue and unsatisfied, and in my view, on the 16th of June they were not only insolvent, as they admit the fact to have been, but they were fully conscious of the existence of all the circumstances which made them insolvent; and under such a state of facts, but little reliance can be placed by the court in the statement of the bankrupt, that at that time they had no reason to believe they were insolvent.

Was this mortgage executed by the bankrupts with a view to give a preference to any creditor or person having a claim against them or who was under any liability for them?

The mortgage was not given to secure the original liability of the respondents, but they loaned to the bankrupts the money to discharge these liabilities, with the exception of the amount due Cole, and received the mortgage to secure these amounts. It is claimed by the answer, that the mortgage therefore was given to secure a present consideration and not an existing liability.

Such a construction of this transaction cannot be sustained under the provisions of the Bankrupt Act. If it could be, all an indorser or surety need do to obtain valid security for his liability would be to lend his principal the amount with which to pay the debt, and receive back a mortgage as security for the loan. Such a proceeding, within the purview of the Bankrupt Act, is nothing more than an exchange or substitution of secu-

rities, a mere attempt and contrivance to relieve or protect an indorser or surety, and whatever means may be adopted to accomplish this purpose, it will prove invalid under the Bankrupt Law, when it is designed and used to obtain a preference for the party who is under a liability for the bankrupt. In the present case, the security in all respects would have been equally valid, if it had been so drawn as in terms to indemnify the respondents as indorsers or sureties on the notes for which they were liable.

The testimony of Nowell, who was the book-keeper, and probably more conversant with the condition of the firm than Chadbourne, has not been taken, as he has left the State, and we must judge of his motives and purposes from the course adopted and its natural consequences. Chadbourne states that his purpose in making the mortgages was to meet the notes that were due and about coming due, and that he did not give them to Hooper & Cole, to give them a preference over the other creditors.

Whilst I have no doubt that he desired to meet these notes, I feel equally confident that he intended by these mortgages to protect Hooper & Cole against loss, and that they should be secured at any rate against all liability; all the circumstances compel me to this conclusion. Both members of the firm knew that they had not met their payments as they fell due, their liabilities to the amount of fifteen hundred dollars were then overdue, including the money due to Cole, and they had no means to pay these sums excepting the money received from Hooper & Cole on this security.

On the 12th of this very month, they were indebted to Holmes & Co. over one thousand dollars, part of which was on notes which were overdue, and one of which had been so for six or seven months. Instead of giving them any security of preference, they asked and obtained an extension for the whole amount. They were owing two other notes to the banks on which other parties were sureties or indorsers, one of which, at least, was a renewal, but neither of these notes were paid or secured although they were soon payable.

They were owing other parties in Biddeford and Saco about two thousand dollars for borrowed money, some of it for more than a year, but none of these did they think proper to secure in any way, but they did secure every dollar for which either of these respondents could in any way be made accountable for the firm or either of its members, although a portion of it was not then due and payable.

If their object, as is now claimed, was to relieve themselves from their bank liabilities and paper falling due, why did they not pay these other notes, which were held by these same corporations? Why make this distinction, and pay those and only those for which the respondents would be accountable, leaving all the others unpaid or secured.

Again, why should the firm pay the Savings Bank Nowell's individual debt? This was not a firm liability, it was Nowell's private note, on which Cole and Chadbourne were sureties, and so far as it appears, was not due at that time, and if it had been, such institutions are always ready to loan their funds on good security, and the bank would not, probably, have pressed for payment, if the parties were in good credit, and desired further time or a renewal of the loan.

Why pay Chadbourne's note of five hundred dollars to Gardner Libby? What reason, other than to protect the surety, Cole, is shown for selecting this liability of one of the members of the firm, and discharging it with the copartnership assets, whilst there were overdue and unpaid large amounts of borrowed money loaned the firm, and for which the lenders had no security.

It thus appears that they were not satisfied with discharging the claims against the firm upon which these respondents were liable, but they also undertook to discharge, with the firm property, the individual liabilities of each member to the amount of five hundred dollars; or rather to allow Cole to pay these individual liabilities for which he was accountable as surety, and receive therefor, from the firm, the partnership note for the amount thus paid, secured by a mortgage of the partnership estate. The firm was under no liability for this

amount, it could not have been in any way made accountable for it, or its property applied to its discharge. Chadbourne took legal advice about these mortgages, and was probably aware that, as those claims then stood, neither the holders nor the sureties could look to the firm for payment. Why should the firm pay or assume these demands, or charge its property with the payment of them, unless the object and purpose was to relieve the sureties upon them from their liability? If this was the design, then the course adopted, of giving the company note for the amount so paid by Cole, in discharge of their individual claims, and securing this note by a mortgage, was proper to accomplish the object, excepting for the provisions of the Bankrupt Law. But unless done for that purpose, what excuse can be suggested for the members of a firm applying one thousand dollars of its company property in discharge of their private debts, the firm at the time being insolvent? They had no right to so conduct with the property of the partnership, for which they were then indebted for more than they could pay, and they could not but be aware that thereby they were diminishing, to that extent, the assets which they had for the payment of their partnership creditors, who had an equitable claim upon their property under these circumstances, for their security. When insolvents in such a condition so dispose of their partnership effects, I think it is an extremely charitable construction of their conduct, if I only infer that it was done for the purpose of preferring those who are benefited thereby. To many minds, I apprehend, it would present itself as worthy of a much severer judgment.

The excuse now suggested that they wanted to take up the paper which was thus paid, so that they could give their attention to their business, is futile and vain; in the first place, they left outstanding against them claims for nearly as large an amount of borrowed money as was paid, some of which was due to the very banks to which their payments were made. And the instant the mortgages of all their joint and separate estates were known to creditors, their credit with them would be entirely ruined and destroyed. The slightest investigation

of their affairs would develop still more clearly their deep insolvency, and not a dollar could afterwards be obtained by them on credit. The inevitable consequence of such mortgages, as everybody well knows, is to put an end to further credit for a party, and break up and terminate his business, and especially would such be the results when none of the demands due for merchandise, were secured, but bank notes of the firm, and private demands of the partners, were protected by the mortgage. The bankrupts are not shown to have been wanting in ordinary intelligence. I must, therefore, hold them to have been well aware of, and intending the ordinary and usual result of such a proceeding, and that they could not have supposed that they would be able to continue their business, after the execution of this conveyance.

It appearing, then, to my entire satisfaction, that the bankrupts were insolvent and well aware of it, and that they intended a preference to the respondents by this assignment, the question remains whether Cole & Hooper had reasonable cause to believe them insolvent, and that this conveyance was made in fraud of the act, that is, that a preference was intended.

Cole & Hooper swear "that they did not know but that the bankrupts could pay their liabilities as they fell due, in the ordinary course of business; that they had no knowledge of their insolvency, or suspicion that they had not property to pay their debts, and had no belief or reason to believe that either of them was insolvent or in contemplation of insolvency or bankruptcy."

On reference to the 35th Section of the Bankrupt Law, it will appear that the question is not what the party benefited by the conveyance actually believed as to the bankrupt, but it is what he had reasonable cause to believe on this subject. The language is: "the person receiving such conveyance having reasonable cause to believe such person is insolvent, and that such conveyance is made in fraud of the provisions of this act."

The very same section declares that when such conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud.

This last provision is found at the close of the paragraph which declares certain conveyances fraudulent when made within six months, and is not at the close of the preceding paragraph, declaring certain conveyances in preference of creditors and others fraudulent if made within four months. It may be contended, therefore, that the presumption of fraud is applicable only to fraudulent conveyances and not to preferences.

The provisions of the 35th Section of the Bankrupt Act were extracted, almost *verbatim*, from the Insolvent Law of Massachusetts, and are to be found in the 89th and 91st Sections, Chapter 118, of Massachusetts General Statutes, the 89th prohibiting fraudulent preferences, and the 91st fraudulent conveyances. At the close of the 91st Section, it is declared "that if the sale, etc., is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of such course of belief." In the Bankrupt Act the language is, "shall be *prima facie* evidence of fraud."

In Massachusetts, notwithstanding this provision is found at the close of the 91st Section, and is not in the 89th, it has been decided that it applied to causes under both sections. (See 8 Allen, 451, *Nary* v. *Merrill et al.*; 10 Allen, 493, *Metcalf et al.* v. *Munson.*) And I am inclined to adopt this as the true construction of this clause in the 35th Section of the Bankrupt Act, especially as all the provisions are there united in a single section, and not found in different sections, as in Massachusetts act. Such, I understand, is the construction which has been given to this clause by the District Courts. (1 B. R., 169.)

It is too plain for argument, that this mortgage was not in the usual course of the bankrupt's business; it is, therefore, to be taken by me as fraudulent, unless the contrary is established. The burden is on the respondents to explain the transaction; this they have attempted to do by their absolute and unqualified statements that they had no knowledge of the insolvency of the bankrupts, and had no belief or reason to believe that such was their condition, and that they did not receive the same with any intent to obtain a preference. Much of this statement was

clearly inadmissible, and should have no influence upon the judgment of the court.

The question raised by the statute is not the actual belief of the respondents, but is what they have reasonable cause to believe, and the facts and circumstances satisfy my mind that they had reasonable cause to believe that the bankrupts were insolvent and intended a preference, and I am bound to declare the conveyance void, although I might be satisfied that the respondents were credulous enough to have believed the contrary.

In 15 Gray, 38, *Coburn* v. *Proctor et al.*, Bigelow, J., has clearly and conclusively expounded the like provision, in the Massachusetts Insolvent Law. He says: "The actual belief of the defendants as to the solvency of the debtor was wholly immaterial. The only inquiry which, under the statute, was relevant to the issue was, whether the defendants had reasonable cause to believe the debtor insolvent, that is, whether, in view of all the facts and circumstances which were known to the defendants, concerning the business and pecuniary condition of the debtor, in connection with the time and mode of the transfer of the property taken, they, as reasonable men, acting with ordinary prudence, sagacity, and discretion, had good ground to believe that the debtor was insolvent. This was the only legitimate subject of inquiry as to the belief of the defendants which could be properly gone into before the jury. It was not intended by the statute to make the actual belief of the party, concerning the solvency of the debtor, one of the standards by which to test the validity of the transfer of property to him. Such a belief might or might not be well founded. It would be an uncertain and fluctuating standard. That which would satisfy one man would be wholly insufficient to convince another; and those facts which would fall far short of producing a belief in a person who was disinterested and impartial, might have a different effect upon the same person when acting under a strong influence of self-interest. In the place of a test so uncertain and unsatisfactory as the belief of a party, formed under a great bias, the statute established one much

more safe and definite, applicable to all persons alike, and easily understood and readily applied by a jury—the belief of a reasonable man taking a transfer of property under like circumstances."

Turning now to the facts and circumstances as here developed, what conclusions should a disinterested and impartial mind draw from them? One of the respondents was a director of the bank to which the bankrupts at this time were indebted fifteen hundred dollars—seven hundred and fifty dollars of which was past due and unpaid, and for this the other respondent was liable—and although Cole swears that at the time he received the mortgage he only knew that one note was past due at the banks, Chadbourne says, "that Cole and Hooper both knew from what was said to them, that these notes in the bank were overdue and unpaid." And it would certainly be somewhat unusual, if a bank director in Biddeford was ignorant that two notes held by the bank, amounting to seven hundred and fifty dollars, and which had been taken in renewal of former discounts, remained overdue for some time—particularly when such director was himself a surety for the principal, for larger sums due to other parties, a portion of which was also overdue—it is quite unreasonable to ask the court to presume a party to be so inattentive to his trust as a director, and so ignorant of the condition of one for whom he was so largely accountable.

From the evidence, I must conclude that Cole and Hooper were aware that the paper of the bankrupt, to the amount of twelve hundred and fifty dollars, and upon which one or the other were sureties, was overdue at the time of the negotiation of the mortgage, and that similar paper, to a larger amount, would soon fall due, none of which could the bankrupts discharge, excepting by a mortgage of their estate, as the bankrupts then informed them.

The language of Blatchford, J., in 2 B. R., 186, *In re Dibble et al*—is quite applicable. He there says, "but one overdue debt is sufficient to put a party in the condition of owing a debt which he is unable to pay. If, at the time the sheriff appeared with the execution, to levy on the stock of goods, the

firm owed this debt and were unable to pay it, in the ordinary course of their business, they were then insolvent in the language of the Bankrupt Act, and its meaning. No matter how many other debts there were not yet due, if they were unable to pay that debt in the ordinary course of their business they were insolvent. The ordinary course of their business does not mean an ability to turn their goods, or bills receivable, or assets, or securities to pay that one particular debt, at the same time leaving other debts which are certain to become due unprovided for, and not leaving sufficient assets in the hands of the debtors to meet them when they become due. It is not in the ordinary course of business for a party who has a stock of goods and other securities, and owes a mature debt, to turn out a large portion of those goods, or to take the most valuable of his security, and turn them over to the creditor to extinguish that debt, if sufficient assets do not yet remain to pay the rest of his debts in the ordinary course of his business; that is an extraordinary course of business, and not the ordinary course of business." That remark well characterizes this mortgage now under consideration. It was an extraordinary proceeding. These respondents not only had reasonable cause to believe the bankrupts were then insolvent, but from the information communicated to them by the bankrupts, at the time of the negotiation for the security, I find that they had actual knowledge of the insolvency.

The bankrupts having intended a preference of the respondents, did they not, at the time, have reasonable cause to believe such was the design in giving the mortgage? Having already dwelt at some length on the facts and circumstances, which have satisfied me that the bankrupts intended a preference, it is not necessary that they should again be repeated. It is sufficient to say, that I find that Cole and Hooper were perfectly cognizant of the most important of them, and as men of ordinary intelligence they could not but have reasonable cause to believe that it was intended to give them a preference. They were aware that all demands for which they could be held liable, as well for the individual members as for the firm, and

whether the same had matured or not, were to be paid, whilst other demands, held by the same banks, and upon which other parties were responsible as sureties, were left wholly unsecured. That by this arrangement debts not due were anticipated, and thereby the discount which was paid was lost. The circumstance, that more than one thousand dollars of the property of the firm was thus applied to the discharge of the personal liabilities of the partners, and not to the firm debts, cannot but have a very great effect on my judgment.

The defendants, then, well knew that the firm was heavily indebted for their stock in trade, and it should have remained unencumbered to be applied to the satisfaction of those debts, and the respondents should not have received this property for the security of their individual claims. They should have known it was grossly unjust, and that a firm thus conducting with their partnership assets could not be dealing fairly and honestly with the property. When it is found necessary to apply so large a proportion of firm property to the security of the individual indebtment of the partners, a court of equity should require plenary proof that it was not designed as a preference.

From all the evidence, I am forced to the conclusion, notwithstanding the statements of the respondents in their own behalf, that, finding a large amount of the paper upon which they were responsible for the bankrupts, was due and unpaid, and that a still larger amount would soon mature, in order to secure and protect them, this scheme of paying these demands, both the overdue and those not yet matured, and taking a mortgage for the amount thus paid, was devised by the parties. It is quite apparent that they distrusted the solvency of the bankrupts, and were desirous of being relieved from their responsibilities. They did not propose to make these advances without security, and, judging from their conduct, they were determined to be secured beyond all question. Chadbourne says, his proposition at first was to mortgage the stock, but Cole demanded in addition a mortgage of Chadbourne's real estate. If they had no doubt of the bankrupts' ability to pay their liabilities, why take any security, the effect of which would be so

detrimental to the credit of the firm? If they were in good credit, and believed by the respondents to be responsible, and the stock was so large as to afford ample security, why not, at least, be contented therewith, and be satisfied with the mortgage of that only, leaving the real estate of Chadbourne unencumbered? This would not answer their purpose. They were not willing to rely on the chattel mortgage; but they proposed and received in addition thereto a mortgage of all Chadbourne's real estate. Not satisfied with the lien on Chadbourne's homestead, they included in the mortgage the adjoining lot, worth but a few hundred dollars, by the whole proceeding quite clearly indicating, to my mind, their distrust of the financial condition of their debtors, and their purpose to obtain security upon all the property which the bankrupt had to convey.

The parties appear to have been aware of the provisions of the Bankrupt Act, for Cole testifies that he consulted with Mr. Goodwin as to these mortgages, asking him if Chadbourne had spoken with him in regard to them. He said that he had, and that he would make them out.

I think that a question arose as to the validity of mortgages under the Bankrupt Law. He said that under certain circumstances they were not good. I think that he may have stated the circumstances.

Being thus advised of the provisions of the Bankrupt Act, it seems to me that these parties undertook to evade and circumvent them by paying the existing demands, and taking new security therefor, which they claim, by their answers, as a present consideration for the mortgage. Such a proceeding cannot receive the sanction of a court administering the Bankrupt Law, and if the final result should be an entire loss to these respondents of all right to share in the bankrupt's estate, it may not be entirely without profit and advantage, as it may prove a salutary lesson to them and the public generally, not to attempt to evade the provisions of so just and equitable a law as the Bankrupt Act.

They have read in evidence the testimony of the president and cashier of one of the Biddeford banks, and of other resi-

dents of that place, that in the opinion of these witnesses, Chadbourne & Nowell, at the time of giving the mortgage, were solvent, and in good credit, and that they would have loaned them money. A conclusive answer to this testimony is the belief of these respondents, on these points, to be determined from their own conduct. They were unwilling to make the loan at that time, without receiving as security all the real and personal estate both of the firm and of its members, and were so doubtful of the solvency of the firm, that they were not content with the mortgage of all the company property. From their business relations with the bankrupts, I may well infer that the respondents were better cognizant of their situation, and were unwilling to trust to their personal responsibility.

Decree for complainant declaring the conveyance void, and case referred to Master to take account of property remaining, as well as of that sold by respondents.

Rand, for complainant.

Shepley and *Strout*, for respondents.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

An agreement of certain creditors with a solicitor that he should prosecute at his own expense, and save them harmless, in consideration of his retaining three-fourths of all sums recovered, their claims against bankrupts based on debts valid in their inception, is no defense against the same on account of champerty.

Where it appeared to the court from the facts shown by the evidence taken on a reference had on a petition of a supposed creditor, that certain claims of other creditors be disallowed and rejected, that he had purchased claims against the bankrupts to prove as a creditor, while he was, in fact, acting in their interest,

Held, all proofs of claims by him, or of claims purchased by him, should be stricken out. A reference will be ordered by the court without any application therefor by which to ascertain such claims.

In re ROBERT LATHROP *and others, composing the firm of* LATHROP, CADY & BURTIS.

BLATCHFORD, J.—On the 8th of April, 1869, Augustus M. Morgan and George G. Clark filed a petition in this court, alleging that they are creditors of the bankrupts by claims

duly proved herein, and praying, on certain facts alleged in said petition, that certain proofs of debt filed herein by one Cyrus D. Prescott and others, to the amount of forty-eight thousand six hundred and sixty-three dollars, be disallowed and rejected as not due to the claimants thereof. One proof of debt of Morgan and Clark was filed on the 18th of January, 1869, and embraced only one item of claim, being for five dollars and ninety-five cents. Another proof of debt of Morgan and Clark was filed on the 19th of February, 1869, and embraced only one item of claim, being for eighty-six dollars and sixty-one cents. Before any adjudication on said petition of Morgan and Clark, and on the 12th of April, 1869, a petition was filed in this court by the said Prescott, alleging that he is a creditor of the bankrupts, by claims duly proved herein, to the amount of fifty-four thousand one hundred dollars and sixteen cents; that he is the owner of the said claim, amounting to eighty-six dollars and sixty-one cents, proved by Morgan and Clark, having purchased it from them before it was so proved, and had proved it himself as a claim herein, and that the alleged claim of five dollars and ninety-five cents has no valid existence. The petition prays for an order referring it to a Register, to investigate the existence and validity of the claims of Morgan and Clark, and that such claims may be rejected and disallowed. On this petition an order was made by this court on the 22d of April, 1869, referring it to Register Dwight to take proof as to whether Morgan and Clark are creditors or not of the bankrupts, and, if so, in what amount, and to report the same to this court, with his opinion thereon. In pursuance of this order, the Register has reported the testimony taken before him thereunder, and has also reported that in his opinion Morgan and Clark are creditors of the bankrupts in the sum of eighty-six dollars and sixty-one cents, besides interest, and that the claim of five dollars and ninety-five cents ought to be disallowed as not an existing debt.

The case has been argued before the court on the testimony and report, on the question as to whether the report should be confirmed by the court.

The first point taken on the part of Prescott is that the claims of Morgan and Clark ought to be rejected because they are prosecuted under a champertous agreement made between Morgan and Clark, and one Paoli Lathrop. The agreement is in evidence. By it Morgan and Clark appoint Lathrop their agent to take such proceedings for them, in law or otherwise, to recover from the bankrupts or settle with them for said claims, as he may deem advisable, but all such proceedings are to be at the cost and expense of Lathrop, who is to save Morgan and Clark harmless therefrom; and in consideration thereof, Morgan and Clark agree that Lathrop may retain, as compensation for his services, three quarters of any and all sums he may recover or collect on account of said claims, besides the expenses he may incur in so doing, the remainder to be paid to Morgan and Clark.

Morgan and Clark do not come into court to enforce a right of action against the bankrupts which owes its existence to this agreement with Lathrop. Their claims against the bankrupts, if valid, exist independently of such agreement. Nor is Lathrop a party to these proceedings, setting up such agreement by way of offensive or defensive action. The agreement is a collateral matter. The claims of Morgan and Clark are not founded on it as a cause of action. Under such circumstances it has never been held that an agreement made by the creditor with a third party in reference to the prosecution of a claim, although it would be held to be champertous if either party to it were setting it up as the foundation of a suit or a defense in a court of justice, can be used to defeat the creditor in establishing a claim otherwise valid. In the case of *Hall* v. *Gird*, 7 Hill, 586, a suit to foreclose a mortgage was brought under an agreement made between the plaintiff and her solicitor, by which the latter was to have one-third of what should be collected. The Chancellor held that this, which was the only defense set up, was no defense whatever, and his decision was affirmed by the court for the correction of errors. The opinion of that court was delivered by Mr. Justice Beardsley, who held that the agreement did not invalidate the mortgage or impair the

obligation of the mortgagor. He says: "An offer to use a mortgage or any other security, valid in its inception, or even its use, for an illegal purpose, is not, at common law, any impediment to its collection, nor any color of defense, permanent or temporary, to the mortgagor or debtor, when payment is sought to be enforced. He is not allowed to assert that the vitality of his own obligation has become extinct by the illegal use to which that obligation has been applied, and thence infer that he is no longer liable on his engagement. Such a principle can hardly be seriously urged, and such a consequence cannot for a moment be admitted." In the case of *Boone* v. *Chiles*, 10 Peters, 179, a bill was filed to compel the conveyance of the legal title and an account of the rents and profits of certain land. The suit was brought in pursuance of an agreement made between the plaintiff and a third person, by which such third person undertook, at his own expense, to prosecute a suit for the land, and, as a consideration, he was to have one-half of the land. The defendants set up such agreement as a defense, and claimed that the case was one of champerty, in which the court could give no relief. The court held that the objection to the plaintiff's recovery on the ground of the agreement in question being champertous, could not be sustained; that the suit, although instituted in furtherance of the agreement, was not between the parties to it; that it did not concern the defendants whether the suit was commenced and conducted by the agency of the third party or by the plaintiff; and that the right of the plaintiff was not forfeited by such an agreement, and might be asserted against the defendants, whether the agreement made by the plaintiff with the third party was valid or void. In the case of *Hilton* v. *Woods*, 36 Law Journal, N. S., Part 1, Chancery and Bankruptcy, 941, a bill was filed to establish the right of the plaintiff to the coal mines under certain lands. It was shown to have been filed under an agreement made between the plaintiff and a third party, whereby, in consideration that the third party guaranteed the plaintiff against any costs in the suit, such third party was to have a portion of the value of the property, if recovered. Vice-Chan-

cellor Malins said that he had carefully examined all the authorities referred to in support of the argument that the agreement under which the suit was instituted amounted to champerty and maintenance, and consequently disqualified the plaintiff to sue. He added: "They clearly establish, that whenever the right of the plaintiff, in respect of which he sues, is derived under a title founded on champerty or maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding that where a plaintiff has an original and good title to property, he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise." He further said that the agreement in question amounted to maintenance, and if the third party had been the plaintiff suing by virtue of a title derived under that agreement, the bill would have been dismissed; but that as the plaintiff was asserting a title vested in him before he entered into the improper agreement, he was not disqualified to sustain the suit. In the present case, Prescott can claim no greater benefit from the agreement with Lathrop, than the bankrupts themselves could claim, as against Morgan and Clark. The objection in respect of champerty is, therefore, overruled.

The substance of the petition of Prescott is, that he is a creditor of the bankrupts by debts proved by him herein to the amount of fifty-four thousand one hundred dollars and six teen cents; that, after the bankrupts were declared such, Morgan and Clark requested him to buy a note they held against the bankrupts, amounting to one hundred and seventy-three dollars and sixty-three cents, due November 17th, 1867; that he bought it at a price agreed on, and it was transferred to him by Morgan and Clark, and he has ever since owned it; that he has proved it as a claim herein; that Morgan and Clark have proved a pretended claim herein of eighty-six dollars and sixty-one cents, part of the said note for one hundred and seventy-three dollars and sixty-three cents; that Morgan and Clark have also proved a pretended claim herein of five dollars and

ninety-five cents; and that Morgan and Clark have no claims against the bankrupts, and the two claims proved by them are founded in fraud, illegality, or mistake.

A vast volume of testimony has been taken before the Register on the reference. It is claimed on the part of Morgan and Clark that the evidence shows that the alleged sale of the note by Morgan and Clark to Prescott, which was made at the price of fifty cents on the dollar, was not a sale to Prescott; that it was induced by false representations made by the bankrupts and by Prescott; that Prescott in purchasing the note did not act for himself, but acted for the bankrupts and as their agent; and that the money he used in buying the note was not his own money, but was the proceeds of collections of assets which belonged to the bankrupts at the time their petition in bankruptcy was filed.

It is apparent from the evidence, that Morgan and Clark, in parting with the note to Prescott, and receiving the fifty per cent. thereon, supposed they were settling and compromising with the bankrupts in respect of the note. They were not selling the note in reality to Prescott, and Prescott was not buying it. He was acting for the bankrupts. The purchase was one made for and by the bankrupts.

Morgan and Clark cannot prove a part of the debt, nor can Prescott prove the whole of it. But Morgan and Clark, not being creditors in respect of any part of it, cannot question the right of Prescott to prove it. That right must be questioned otherwise. I see no evidence that the compromise was made by Morgan and Clark by means of any false representations made by the bankrupts, or by any one of them, or by Prescott as their agent. It is apparent that they compromised the claim because they regarded it as more advantageous to them to take in cash one-half of the claim than to hold the claim longer. The proposition, that even though no false or fraudulent representations were made by the bankrupts, or by Prescott, to induce the compromise by Morgan and Clark, they are entitled to hold their claim against the estate of the bankrupts for the balance beyond the fifty per cent., cannot be maintained. As

to fraud, if the contract of compromise were void for fraud, so as to give to Morgan and Clark the right to ask for its rescission, they are not in a position to do so. Such contract, if void for fraud, must be so void in the whole and not in part. Morgan and Clark, by proving their claim for the one-half of the note, while they retain the fifty per cent. paid and do not offer to return it, and while they insist that they did not sell the note to Prescott, and that they were engaged in making a compromise in regard to it with the bankrupts, are seeking to affirm one-half of the contract and to disaffirm the other half. This they cannot do.

As to the claim of five dollars and ninety-five cents, I think it has no existence aside from the note, and that it merged in the note when that was made.

It follows that the proofs of debt filed by Morgan and Clark must be disallowed and rejected. It is provided, however, by the 22d Section of the Bankruptcy Act, that "the court may, on the application of the assignee, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering, or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake." As such examination may be made without any application therefor, and as the court sees, from the testimony now before it, that the claims proved by Prescott, and those by other persons, and since purchased by Prescott, are not the property of Prescott, for the reason that he acted for the bankrupts in purchasing such claims, both unproved and proved, they must be rejected as illegal.

It is not necessary to determine now what funds were used by the bankrupts to make the purchases which Prescott made for them.

An order of reference will be made to the Register in charge of this case to report, on the testimony heretofore taken, and on such further testimony as he may choose to take, what

claims proved by Prescott, or proved by others, and since purchased by Prescott, ought to be rejected under the foregoing decision.

Vernam & Wilcox, for Morgan and Clark.

E. W. Stoughton and *D. A. Hawkins*, for Prescott.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Before the court can take action on the failure of an assignee in bankruptcy to comply with the requirements of General Order No. 28, the same must be shown to it by at least *prima facie* evidence.

In re WILLIAM F. GOODWIN.

I, ISAIAH T. WILLIAMS, the Register of this court in bankruptcy, to whom has been referred the above-entitled matter, do hereby certify to this Honorable Court, that George V. House, of 683 Broadway, in the city of New York, was on the 9th day of July, A.D. 1869, duly elected assignee of the estate of the above-named bankrupt, and duly executed the bond required by the 13th Section of the act, and received from me the assignment of the estate of the said bankrupt, on the 17th of August, 1869.

And I do further certify that, in pursuance of the Rule of this court in bankruptcy, adopted November 13th, 1869, I have called the attention of said assignee to the provisions of the General Order No. 28, and I hereby bring the case to the notice of the court, although I have no means of knowing whether or not the said assignee has failed to make a report to the court of the funds received by him, as required by said General Order.

Respectfully submitted,

I. T. WILLIAMS,
Register.

BLATCHFORD, J.—When an assignee fails to make a report to the court, of funds received by him, it must be assumed that

no funds have been received by him, and that no deposits have been made by him. In order to warrant proceedings against an assignee for not complying with General Order No. 28, it must be shown at least by *prima facie* evidence that he has received funds, or has made deposits in respect to which he ought to have made a report to the court under said General Order. No such thing is shown in this case, and therefore there is nothing on which the court can base any action in the premises.

The clerk will certify this decision to the Register, Isaiah T. Williams, Esq.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

A creditor having knowledge of his debtor's insolvency, obtained judgment by default, issued execution, and sheriff levied on his property; other creditors petitioned to have the debtor declared a bankrupt, in thereby having committed an act of bankruptcy. Before trial, bankrupt filed voluntary petition, and thereupon was adjudged bankrupt. The judgment-creditor proved his claim for the full amount of his judgment, less what he would receive from the execution, if that should be deemed a valid payment. Assignee petitioned to have the said judgment set aside and declared void, and that said creditor and the sheriff be ordered to pay over to him, less the sheriff's fees, the amounts they severally held and received upon said execution, and further, that the judgment-creditor's proof of claim be rejected.

Held, (1) the bankrupt committed an act of bankruptcy, in so suffering his property to be taken by a creditor on legal process.

(2) The judgment-creditor had received a preference, and not having surrendered what property was received under it, on proving his claim in bankruptcy, the proof thereof must be rejected, and himself and the sheriff ordered to pay to the assignee the amounts in their hands received on such execution, less the sheriff's fees.

In re CHARLES A. DAVIDSON.

BLATCHFORD, J.—This is a petition by Lionel Moses, assignee of the bankrupt, praying that a judgment recovered against the bankrupt, in the Superior Court of the city of New York, on the 21st of July, 1868, by one Oliver Mowbray, for five thousand one hundred and eighty-two dollars and eighty cents, be set aside and declared void, and that said Mowbray be ordered to pay over to the petitioner the sum of one thousand

two hundred and thirty-one dollars and fifty cents, received by him upon an execution issued on said judgment; and that the sheriff of the city and county of New York, to whom such execution was issued, be ordered to pay over to the petitioner the sum of two thousand eight hundred and forty-seven dollars and two cents, now in his hands as assets of said bankrupt, realized on a sale of his property of said bankrupt, on said execution, and that the proof of debt against the estate of said bankrupt, filed by said Mowbray, be rejected and disallowed, and stricken out. The judgment was recovered by default. The execution was issued on the 21st of July, 1868, to the said sheriff. On the same day the sheriff levied on the personal property of the bankrupt, under the execution, and took it into his possession. He afterwards sold it under such levy for four thousand and seventy-eight dollars and fifty-two cents. Of this sum one thousand two hundred and thirty-one dollars and fifty cents were paid over to Mowbray. The balance now in the hands of the sheriff, less his fees, is two thousand three hundred and eighty dollars and twenty-two cents. On the 28th of July, 1868, creditors of the bankrupt filed a petition against him in this court, praying that he might be adjudged a bankrupt. The act of bankruptcy alleged in the petition was, that being insolvent or being in contemplation of insolvency, he procured and suffered his property to be taken on legal process in favor of said Mowbray on said execution, with intent thereby to give a preference to said Mowbray, and with intent by such disposition of his property, to defeat and delay the operation of the Bankruptcy Act. After a denial of bankruptcy and a trial by the court, the bankrupt was, on the 22d of February, 1869, adjudged a bankrupt on said petition. On the 29th of December, 1868, the bankrupt filed in this court his voluntary petition to be adjudged a bankrupt, on which he was adjudged a bankrupt on the 15th of January, 1869. At the first meeting of creditors on the 12th of February, 1869, Moses was elected assignee. The petition now under consideration was filed on the 4th of March, 1869. The ground on which it proceeds, in asking the relief it prays for, is, that at the time of the entry of the said judg-

ment and of the levy and sale thereunder, the bankrupt was insolvent; that he suffered and procured his property to be taken on execution with intent to give a preference to Mowbray, and with intent, by such disposition of his property, to defeat and delay the operation of the Bankruptcy Act; and that at the time of the commission of the said act of bankruptcy by the bankrupt, and at time Mowbray received such preference, Mowbray had reasonable cause to believe that a fraud on the act was intended, and had reasonable cause to believe, and in fact knew that the bankrupt was insolvent. On the 24th of February, 1869, Mowbray filed a proof of debt against the estate of the bankrupt on the said judgment for its full amount, less such amount realized upon said execution as he might finally be deemed entitled to receive, and the amount already then received thereupon, provided the same should finally be deemed to be a valid payment.

On the answers of Mowbray and of the sheriff to the petition, proofs have been taken, and the case comes up now for decision. There is no room for doubt, on the evidence, that, as a matter of fact, the bankrupt was insolvent when he suffered his property to be taken on the execution, and that he suffered such property to be so taken with intent to give a preference to Mowbray, as a creditor of his, and that Mowbray at that time had reasonable cause to believe that the bankrupt was insolvent, and that a fraud on the Bankruptcy Act was intended within the 35th and 39th Sections thereof.

It is urged on the part of Mowbray, that although the bankrupt was insolvent when the levy was made, and although Mowbray had reason to believe so, yet the bankrupt had prior to that time committed no act of bankruptcy; that the position of Mowbray was only that of a diligent creditor to whom no other course was open, using the arm of the law to collect a valid debt; that if the relief asked for in this case is to be granted, an insolvent debtor who has not committed any act which subjects him to be proceeded against as an involuntary bankrupt, may practically set his creditors at defiance; that the knowledge that such relief as that here asked for will be

granted, if the creditor proceeds to take the property of the debtor on legal process, under the circumstances existing in this case, and if the debtor is afterwards adjudged a bankrupt, will deter him from doing so, and that thus, if the debtor does not choose to go into voluntary bankruptcy, no remedy whatever will be open to the creditor. This view is fallacious. The penalty upon the creditor, provided for by the 39th Section, of not being allowed to prove his debt in bankruptcy, is enforceable against him only in case he compels the assignee to resort to legal proceedings to recover back the property transferred in violation of the act, and in case such proceedings are successful. If he accepts a preference, having reasonable cause to believe that it was made or given by the debtor contrary to some provision of the act, he cannot prove the debt or claim on account of which the preference was made or given, or receive any dividend therefrom, until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference. Such is the provision of the 23d Section of the act, and it must be construed in connection with the 39th Section, in such manner that, if possible, both may stand. The construction which this court has given to these two sections, in respect to the provisions in question, *In re* Montgomery, 3 B. R., 97, has been that the clause in the 39th Section in respect to not allowing the creditor to prove his debt in bankruptcy, applies only to cases in which the assignee is compelled to resort to legal proceedings to recover the property; that the creditor who claims to retain the property, makes himself conclusively a party to the fraud against the act by resisting the claim of the assignee to recover the property, in case the assignee is successful; but that where the creditor avails himself of the *locus penitentiæ* given to him by the 23d Section, by voluntarily surrendering the property to the assignee, he ceases to be a party to the fraud, and may prove his debt in bankruptcy and receive dividends on it. This removes all the embarrassment and difficulty suggested in this case. Mowbray, after taking the property of the bankrupt on legal process, could himself have thrown him into bankruptcy

for that act, and could then have voluntarily turned over the property so taken to the assignee. Instead of having done so he resists the claim of the assignee after others have put the debtor into bankruptcy, and he must now pay the penalty plainly imposed by the 39th Section, and which he might easily have avoided.

The prayer of the petition is granted in respect to both Mowbray and the sheriff, and the claim of Mowbray embraced in his proof of debt must be rejected.

G. A. Seixas, for the assignee.

J. E. Parsons, for Mowbray.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

A copartnership existing between H. and R. was terminated by R. assigning and transferring all his interest as copartner to a third party. H. subsequently filed petition that the firm, and each of its members, be adjudged bankrupt.

Held, the prayer of the petition must be denied as to the firm and as to R., inasmuch as the case is not within the provisions of Section 36 of the act, and H. and R. were not copartners, and no property of the said copartnership, as such, existed, at the time said petition was filed. Order of adjudication entered as to H.

In the matter of the petition of PETER C. HARTOUGH *for an adjudication of bankruptcy against himself* AND JAMES C. HAYDEN AND WILLIAM REED *as partners in trade, composing the copartnership of* P. C. HARTOUGH & Co.

BLATCHFORD, J.—On the facts proved in this case, it is established that James C. Hayden never was a copartner with Peter C. Hartough and William Reed.

The copartnership which was formed between Hartough and Reed on the 1st of June, 1867, continued until the 9th of November, 1868, and no longer, and was dissolved on that day, by the instrument of assignment executed on that day by Reed to Samuel H. Reed. Inasmuch as that instrument assigned and transferred to Samuel H. Reed all the right, interest, prop-

erty and claim of William Reed in and to the partnership and business of the firm, and in and to all property owned and held by William Reed as tenant in common with Hartough or as partner in the firm, there ceased at that time to be any joint stock or property of Hartough and William Reed as partners in trade, or of the firm as composed of those persons as partners in trade. The case is, therefore, not one within the provisions of Section 36 of the Bankruptcy Act, because Hartough and William Reed were not partners in trade when the petition of Hartough was filed, on the 4th of May, 1869, and because there was not then any joint stock or property of the copartnership which existed down to the 9th of November, 1868, composed of Hartough and William Reed; that is, joint stock or property belonging to such two persons as having been partners in such copartnership. Aside from the provisions of Section 36, it is not claimed that William Reed can be adjudged a bankrupt on this petition of Hartough. He does not himself petition to be so adjudged. On the contrary, he resists the granting of the prayer of the petition of Hartough, which is that Hartough and William Reed and Hayden may each of them be adjudged by a decree of the court to be a bankrupt, and that the firm of P. C. Hartough & Co., composed of such three persons, may be so adjudged.

The prayer of the petition is denied as to Hayden and William Reed, and an order of adjudication will be entered as to Hartough.

J. A. Welch, for P. C. Hartough.

Marsh, Coe & Wallis, for Hayden.

Barney, Butler & Parsons, for William Reed.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

After examination of a creditor touching his claims, on a day ordered upon the application of the assignee in bankruptcy, the creditor moved upon his own evidence, and upon affidavit, for leave to amend proof of claim, to which the assignee objected.

***Held*, the court has, at all times, full power and control over proofs of claims, and may allow amendments and supplemental proofs to be filed.**

In re HENRY B. MONTGOMERY.

AT a Court of Bankruptcy held at the office of Olney & King, in Catskill, in said district, on the 30th day of November, A. D. 1869, before Theodore B. Gates, Register of said court in bankruptcy,

James B. Olney, one of the creditors of the above-named bankrupt, proved his debt against said bankrupt, individually, on the 28th day of May, 1869, at the sum of two hundred and twenty-five dollars; and he also proved, at the same time, a debt of the same amount against said bankrupt, as a member of the late firm of Montgomery & Sage.

On the application of the assignee in this matter, an order had been granted requiring the said James B. Olney to appear before the undersigned on or about the 6th day of October last past, and submit to an examination in regard to his said claim. Sundry other creditors were also ordered to appear at the same time and be examined as to their several claims. The said James B. Olney was in attendance as solicitor of one or more of such creditors, and the proceedings were, from time to time, adjourned until the day above-named, before the case of said James B. Olney was taken up. Said Olney was then examined by the solicitor for the assignee on his own claim, and moved upon his own evidence, and upon an affidavit, for leave to amend his proof of claim.

This was objected to by the solicitor for the assignee upon the grounds:

First. It is too late. The original proof of claim having been made on the 28th day of May, 1869, and no application for amendment having heretofore been made.

Second. Also upon the ground that an order upon him to testify in regard to this claim having been made prior to the 6th day of October, 1869, and there having been two or more meetings since that time, and no application having been made prior to this time, it is now too late for the Register to entertain the

motion to amend, and especially after testimony has been given in the case.

I respectfully submit the question thus presented for the decision of his Honor the District Judge.

I think the amendments should be allowed if amendments of proofs of debts are permissible under the Bankrupt Law. Section 22 regulates the mode of proving debts, and provides that the court may, on application of the assignee, or any creditor, or of the bankrupt, or on its own motion, examine the bankrupt upon oath, or any person tendering, *or who has made* proof of claims concerning the debt sought to be proved, and shall reject all claims not duly proved, etc. Under this section it has been held that the court has, *at all times*, full control of all proofs of debts and the right to entertain objections to the validity of the debts or the proofs thereof. (*In re* Patterson, 1 N. B. R., 125; *in re* Jones, 2 N. B. R., 59.) It is the policy and purpose of the law to do equal and exact justice between the estate of the bankrupt and creditors, and this provision should be construed to confer upon the court ample power to investigate a claim at any stage of the proceedings, and to make any correction equity and justice demand; not only to reduce the amount if it is too large, but also to increase it if, through inadvertence, it is smaller than by right it should be. Questions of amendment address themselves to the equitable consideration of the court, and great discretion is exercised in disposing of them. *In re* Brand, 3 N. B. R., 324, it was held that a creditor who had inadvertently prejudiced his rights by making proof in an improper form, should be allowed to withdraw it, and amend or resubmit it in proper form. (See Section 1, Bankrupt Act.) When proof is defective, a party will not only be *allowed*, but will be *required*, to amend it. (*In re* Lowere, 1 N. B. R., 74; *in re* Myrick, 3 N. B. R., 154.)

I think, therefore, an order should be entered in this matter, allowing the creditor to file supplemental proof of claim corresponding with the facts set forth in his affidavit.

THEODORE B. GATES,
Register.

BLATCHFORD, J.—The decision of the Register is correct.

The clerk will certify this decision to the Register, Theodore B. Gates, Esq.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

A debt, to be provable in bankruptcy, must continue to exist in the same condition after as at the time of proceedings commenced.

Where a protested note, on which the bankrupt was principal, held by a bank that had discounted it, was taken up by a new note made by the same parties, and accepted by the bank, after adjudication of bankruptcy,

Held, the original debt was thereby extinguished, and the liability ceased to be a claim on the estate. Proof of a claim based thereon stricken out.

Semble, a second indorser might have proved his claim on the original note, before extinguishment, by way of security against the irresponsibility of any one personally liable thereon, but he could have received dividends only on the amount thereof which he could show that he had personally paid.

In re HENRY B. MONTGOMERY.

AT a Court of Bankruptcy held at the office of Olney & King, at Catskill, in said district, on the 3d day of September, A. D. 1869, and on sundry other days thereafter, before Mr. Theodore B. Gates, Register in bankruptcy,

Jonathan B. Cowles, a supposed creditor of the above-named bankrupt, filed proof of a contingent claim against the said bankrupt on the 24th day of March, 1869. The claim is based upon a note made by Montgomery on the 24th day of December, 1868, for five hundred dollars, indorsed by said Cowles, and at the time of the proof, held by the Farmers' National Bank of Catskill, where it had been discounted.

The assignee in this matter obtained an order for the examination of said Cowles, and his evidence, on such examination, having been taken, the following facts seem to be established by the evidence, namely: On January 8, 1869, Montgomery made his note for five hundred dollars, payable to his own order three months after date, at the Farmers' National Bank, Catskill; the note was indorsed by H. B. Montgomery, Baldwin Griffin, and J. B. Cowles, in the order stated. That note existed and was owned by the Farmer's National Bank of Catskill, where

Montgomery was adjudicated a bankrupt, and where said Cowles proved his claim thereon. The note subsequently fell due, and was protested for non-payment.

On the 19th day of July, 1869, five months after Montgomery was adjudicated a bankrupt, a new note was again, for the same amount, made by Montgomery, and payable three months after date to the order of Baldwin Griffin, at the Farmers' National Bank. This note was indorsed by Baldwin Griffin, J. B. Cowles, and A. C. Cowles, and was used to take up the first-named note.

This second note was protested for non-payment, and on the 19th day of October, 1869, another note was made for four hundred and fifty dollars, signed by Baldwin Griffin, to the order of J. B. Cowles, and indorsed by J. B. Cowles and A. C. Cowles, Montgomery's name not appearing on the paper. This note, together with fifty dollars in money advanced by J. B. Cowles, was used to pay the second note. This last note will fall due on the 20th of January, 1870. Upon the evidence in the case the solicitor for the assignee moved to strike out Cowles' proof of claim upon the ground,

First. The claimant being second indorser, and only liable upon Griffin's failure to pay, is not entitled to prove the claim.

I think that Mr. Cowles would have been entitled to prove his claim upon the original note under the 6th Clause of Section 19 of the Bankrupt Law, by way of security against the possible irresponsibility of any of the parties personally liable, and then his right to share in the dividends would depend upon his having paid any or all of the note. But the real difficulty in the way of Mr. Cowles proving a debt upon the note seems to me to grow out of transactions subsequent to the maturity of the first note, which is doubtless the one Mr. Cowles based his proof upon, although he makes a mistake as to the date of it. From the moment a debtor is adjudicated a bankrupt, he is effectually separated from his estate and his contracts. These pass to the assignee, who becomes the trustee of the estate for the benefit of the creditors. The bankrupt

may, after his adjudication, make new contracts and acquire property which his former bankruptcy does not affect, and which his creditors (if he is finally discharged) cannot reach. See cases cited at note 6, page 53, Bump's L. and P. of Bankruptcy, 2d Ed. If, then, a creditor of the bankrupt shall, after the adjudication, accept a new obligation from the bankrupt in substitution of the debt existing at the time of the filing of the petition, he relinquishes his claim upon the estate of the bankrupt, and must look to his debtor alone for payment of his demand. In this case, Montgomery's note for five hundred dollars, indorsed by Griffin and Cowles, would have been provable by either Griffin, or Cowles, or by the Bank, against the estate, and was so proven by Cowles; but subsequently the bankrupt and all the parties to this note agree to make a new note with which to pay the old and overdue note at the Bank. The Bank accepts the new note, and surrenders the old. The original debt was thereby extinguished, and the liability ceased to be a proper claim upon the estate of the bankrupt. The discharge of Montgomery will not release him from this debt, and whoever finally pays this note may maintain an action against Montgomery for it upon showing the facts herein recited. Section 19 of the Bankrupt Act provides "that all debts due and payable from the bankrupt *at the time* of the adjudication of bankruptcy, and all debts then existing, but not payable until a future day, * * * may be proved against the estate of the bankrupt." But the debt must continue to exist in the exact condition in which it was when the debtor was adjudicated a bankrupt. If he and his creditor bargain about it, after that time, and give it any essential modification, they detach it from the beneficial operation of the law, and carry it over to the new estate in which the debtor has been placed by the adjudication of bankruptcy. *In re Williams*, 2 N. B. R., 229, it was held that when a judgment is rendered after the proceedings in bankruptcy upon a debt which existed before that time, neither the debt nor the judgment is provable. The debt is merged in the judgment, and the judgment did not exist at the time of the adjudication of bankruptcy.

I am of the opinion that the proof of debt filed by Jonathan B. Cowles should be stricken out, and that no dividends should be paid upon it.

THEODORE B. GATES, *Register.*

BLATCHFORD, J.—The decision of the Register is correct.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

The partnership of M. and S., a firm of country merchants, was dissolved by mutual consent, and S. took the books and accounts to collect and pay the firm debts. M. retained the stock of goods, and continued in business, in the course of which he added and mingled new stock with the old, so that they were undistinguishable. S. thereafter was adjudged a bankrupt on his own petition, and subsequently M. was adjudged a bankrupt upon petition of creditors, and the whole stock in his hands was taken possession of and sold by his assignee in bankruptcy,

Held, such assets must be regarded as belonging to M.'s individual estate, and primarily liable to his individual debts in full, before any portion can be applied to pay the debts of M. and S.

In re HENRY B. MONTGOMERY.

BEFORE Mr. Theodore B. Gates, Register in Bankruptcy.

The second general meeting of creditors has been held in this matter, and stands adjourned to the 17th day of January next. A question has arisen in the proceedings in the case as to the class of creditors who are first entitled to dividends, and I am requested by the assignee and also by certain of the creditors, to certify the question to his Honor, Judge Blatchford, for his decision. The facts are briefly these:

Up to November 23d, 1867, the above-named bankrupt and Sylvester B. Sage were copartners in business under the name and style of Montgomery & Sage, at Prattsville, in Greene county, as country merchants. On the day named, Sage sold out his interest in the store to Montgomery. The agreement contains this clause: "also that the said Sylvester B. Sage to take the notes and books of the firm of Montgomery & Sage, and collect the same as far as can be, and with the proceeds of the same to pay all the liabilities of the firm of Montgomery & Sage, which is this day dissolved by mutual consent; but if

there proves to be a deficiency or not enough to pay the debts, the remainder is to be paid equally by both parties; and in case there proves to be an overplus or more than enough to pay the liabilities, then the balance is to be equally divided between both parties."

On the 5th of January, 1869, Sylvester B. Sage was adjudicated a bankrupt on his own petition, and about one month afterwards Henry B. Montgomery was adjudicated a bankrupt upon the petition of certain of his creditors. Montgomery had continued the mercantile business as successor to Montgomery & Sage, and had from time to time replenished the stock of goods, mingling old and new together, and selling from either indifferently, so that it is now impossible to tell which were the goods of Montgomery & Sage and which were the goods of Montgomery alone. Moreover, the entire stock has been sold by the assignee of Montgomery as Montgomery's goods.

I think the assets in the hands of the assignee should be regarded as belonging to Montgomery's individual estate, and liable, in the first instance, to the payment of Montgomery's individual debts in full, before any portion can be applied to the payment of the debts of Montgomery & Sage.

THEODORE B. GATES, *Register.*

BLATCHFORD, J.—I concur with the Register in his conclusions.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where a creditor proved claims on two old promissory notes, and then applied to amend proof so as to show that a new note had been given in a settlement, in which said two notes were part consideration, and they had been proved by mistake,

Held, application to amend must be denied. The creditor may prove a new claim on the new note, and an examination may be had on application of the assignee into the validity of the claims.

In re HENRY B. MONTGOMERY.

BEFORE Mr. Theodore B. Gates, Register in Bankruptcy.

James B. Olney, Solicitor for Thomas Montgomery, a sup-

posed creditor of the above-named bankrupt, moved on affidavit, for leave to amend the proof of the claim of said Thomas Montgomery. The solicitor for the assignee objected to granting such leave, and stated the following ground of objection: 1st. That the application comes too late; that the proof of claim was made on the 24th day of March, 1869, by J. B. Olney, attorney for Thomas Montgomery, on two notes, set out in the proof, of seven hundred and eight dollars, each dated October 19, 1853, with indorsements thereon to July, 1864, amounting in the aggregate to nearly two thousand dollars. That by the affidavit of Henry B. Montgomery, he acted as the agent of his father, in bringing and placing in the hands of said J. B. Olney the notes in question, when by the facts as stated by him and his father, he must have known that these notes had been satisfied by the giving of a note of nine hundred and sixteen dollars in 1864; and that no claim has been made, that there was an error in the proof, until it was discovered that the notes of Montgomery and Griffin could not receive a dividend until the claims against H. B. Montgomery were satisfied; and the counsel for the assignee also objects to the amendment upon the ground that the matter above set forth in the last objection shows bad faith; also upon the ground that it appears by proof of claim of Amelia Griffin (wife of Baldwin Griffin, and daughter of Thomas Montgomery), that on the third of November, 1864, Henry B. Montgomery gave Thomas Montgomery his due bill for one hundred and sixty-two dollars and seventy-one cents on settlement. The solicitor for Thomas Montgomery objects to proof of claim of Amelia Griffin being used on this motion, on the ground that it has no bearing on the motion.

The facts in the case are as follows: Proof was made by James B. Olney, as attorney for Thomas Montgomery, on the 24th of March, 1869, upon three several notes, amounting in the aggregate to one thousand eight hundred and forty-five dollars and twenty-nine cents, which, with five hundred and fifty-four dollars and seventy-one cents interest, the creditor claims to be entitled to receive dividends upon. Two of these notes are for the sum of seven hundred and eight dollars each,

and bear date October 19, 1853, and are made by Montgomery and Griffin. They are both payable to B. P. Cowles, or order, one nine months, and the other one year after date. The notes were not indorsed by the payee. The note is dated April 1st, 1859, for four hundred and twenty-nine dollars and twenty-nine cents, payable one year after date, to Thomas Montgomery, or bearer, and is signed by Henry B. Montgomery. About this note there is no question. Indorsements for interest are make from time to time, on these several notes, down to the 1st of July, 1864, but no part of the principal of either appears to have been paid. The two notes, dated October 19, 1853, were given on account of the sale of certain merchandise (not for money lent, as stated in the proof), by said Cowles to Montgomery and Griffin, who were then copartners, but who dissolved in the fall of 1854. Montgomery purchased the stock, and assumed the debts. Thomas Montgomery is the father of the bankrupt, and Griffin and Cowles were sons-in-law of Thomas. Cowles died, leaving his property, including these notes, to his widow, as part of his personal estate. Soon after the widow died, and these notes went to Thomas Montgomery, the present owner. Henry B. Montgomery swears that he had a settlement with his father in the fall of 1864, of all matters between them except the note of four hundred and twenty-nine dollars and twenty-one cents, and found a balance of nine hundred and sixteen dollars due to his father, and gave him a new note therefor, signed by himself alone, and this he thinks was in November, 1864. That the old notes were not taken up, because his father desired to preserve them a short time, and hold them as memoranda of the settlement, and that deponent has neglected to take them and cancel the same. Henry B. Montgomery was his father's messenger to bring these notes with a power of attorney, to Catskill, and placed them in the hands of his father's lawyer, to be proved in this matter. Indeed, he selected these notes from among the papers of his father, and delivered them to the attorney. Montgomery says he supposed the nine hundred and sixteen dollars was among them. It is a little curious that he did not examine these

papers sufficiently to know whether they were the seven hundred and eight dollar or nine hundred and sixteen dollar notes, and it can hardly be credited that he should have picked out not only notes wrong in amount, but also in number, and carried them thirty-seven miles, and placed them in the hands of his father's attorney for proof, and never have discovered his error. But further on in Montgomery's affidavit, he says: That deponent, in the haste and confusion attendant upon the hearing (the first meeting of creditors), did not think of the note of nine hundred and sixteen dollars above referred to, and not until he had seen his father on his return home, did he remember the circumstances of the transaction. He then looked for the nine hundred and sixteen dollar note, but was not able to find it, nor has it been found. The affidavits of Griffin and Olney are not material to the real question involved, except to show that neither Thomas nor Henry B. Montgomery gave any intimation to either of them from March 24th, when the notes were proved, to October 18th, that there was any error in the proof. The claim proven by Amelia M. Griffin is properly in evidence in this matter, and should be considered in connection with this question. It may throw some light upon the subject, and, if so, the court should avail itself of it. That proof is upon a promissory note in the words and figures following:

$162.71. PRATTSVILLE, *November* 8, 1864.

Due Thomas Montgomery, on settlement, one hundred and sixty-two dollars and seventy-one cents, with interest.

H. B. MONTGOMERY.

The proof states that this note was given on a settlement between the parties to it. By reference to the indorsement on the first seven hundred and eight dollar note, I find the following:

"Received, November 4, 1864, on the within, interest up to July 1, 1864," and on the other a like indorsement, but dated November 3d, 1864.

I cannot reconcile all these circumstances with the statement of Henry B. Montgomery, that he gave a new note for the

balance due on the two old ones. If that had really taken place, why should his father have retained the old notes? The reason given by Henry B. Montgomery is entirely unsatisfactory to my mind. The new note was all the "memorandum" his father required or could have wanted. If he had really given a new note in November, 1864, why should the payment of interest up to July have been indorsed on the old notes on November 1, 1864? If there was a settlement and a new note given in November, 1864, as Henry swears, for nine hundred and sixteen dollars, why should the above note, dated on the 3d of that month, for one hundred and sixty-two dollars and seventy-one cents, "on settlement," have been given? and why should the old notes of Montgomery & Griffin have been proved, if there was a note of Henry B. Montgomery's substituted for them? I think Mr. Montgomery is confused in his recollection of these matters, and that he is entirely mistaken as to the nine hundred and sixteen dollar note. If such a note was given, there seems to have been no consideration for it. The original notes were not surrendered, but were kept until this application was made to amend the proof. Considering the evidence which has been submitted upon this application, with a view to do exact justice between Thomas Montgomery and the other creditor of his son, Henry B. Montgomery, I am constrained to recommend that the application for leave to amend the proof of claim of Thomas Montgomery be denied.

THEODORE B. GATES.

Register.

BLATCHFORD, J.—The proper course by which to obtain the relief sought by the alleged creditor is not by an amendment of the proof of debt. The amendment sought relates to a new and different claim from any one of those embraced in the existing proof of debt. The proper course is for the creditor to prove his newly-discovered debt independently. Then an investigation in regard to it can be had, on the application of the assignee, and also an investigation in regard to the two seven hundred and eight dollar notes, and the due bill for one hun-

dred and sixty-two dollars and seventy-one cents, and the claims which ought to be rejected can be determined on the examination and cross-examination, as witnesses, of the alleged creditor himself and the bankrupt, and Mr. and Mrs. Griffin, and all others who know anything of the facts. For these reasons the leave to amend the proof of debt is denied.

The clerk will certify this decision to the Register, Theodore B. Gates, Esq.

UNITED STATES DISTRICT COURT—LOUISIANA.

A bank, incorporated under the laws of the State of Louisiana, became insolvent, and the Attorney-General of the State in 1868 proceeded in a State court at the instance and by request of the bank, and thereupon a decree was rendered forfeiting its charter, and directing its affairs to be wound up in accordance with the insolvent laws of the State. In 1869, creditors of the bank petitioned to have its assets surrendered and administered upon in bankruptcy, and were opposed by the State Insolvent Commissioners.

Held, the State laws relating to insolvency, insolvent debtors, etc., were superseded on the 1st of June, 1867, by the Bankruptcy Act.

The State court had no jurisdiction in the premises except to the extent of decreeing a forfeiture of the bank charter when its jurisdiction ended.

It was the duty of the directors of the bank, upon learning its insolvency, to have taken proceedings to surrender its assets to be administered upon under the United States Bankruptcy Act.

The fact that the bank was extinct, as a corporation, and its assets being administered upon under decree of the State court, and according to State laws, at the time of creditors filing said petition in bankruptcy, does not affect the jurisdiction of the United States Bankruptcy Court, and it will lay hold of the assets of the bank, in whosesoever hands they may be, and distribute the same in accordance with the provisions of the Bankruptcy Act.

Judgment rendered and decree entered accordingly.

JOHN THORNHILL *et al. v.* THE BANK OF LOUISIANA. SARAH WILLIAMS *et al. v.* THE SAME.

DURELL, J.—These suits were brought by certain creditors of the Bank of Louisiana, with the intent of forcing said bank to make a surrender of its assets to be administered upon, under and in accordance with the provisions of an act entitled "An Act to establish a uniform system of bankruptcy throughout the United States." The questions at issue have been twice argued before the court; first in the month of June last, and again a

few days before the last adjournment for the holidays. The arguments made by counsel were very able, and I have given to the questions mooted much consideration.

The facts involved are these: In 1868, about one year before the filing of the petition in the first of these suits, the Bank of Louisiana, through its president, took steps for the liquidation of its affairs, under certain statutes of the State touching the liquidation of insolvent corporations.

The bank applied, by petition, to one of the courts of the State for an order, calling a meeting of its stockholders, to be held before one of the notaries public of the city, for the purpose of voting upon the question of the propriety of a surrender of its charter; the bank alleging, in said petition, that it was insolvent; that its property was being seized by creditors; and that unless a surrender of its charter were made, and its assets administered upon as in a case of insolvency, the most vigilant creditor would be the most favored, contrary to the policy of the law of the State. Subsequently, and but a few months after the taking of this action, the Attorney-General of the State, at the instance and by the request of the bank, instituted suit in the Sixth District Court of New Orleans, for and in behalf of the State and against the bank, praying for a decree of forfeiture of its charter. The Attorney-General, in his petition, alleged, as the bank had before alleged, that the bank was insolvent, that its affairs were daily growing to a worse condition, and that for the protection of its creditors, and for an equitable distribution of its assets, a decree of forfeiture of its charter should be rendered, the corporation dissolved, and its property placed in the possession of commissioners appointed by the court, to be administered in accordance with the provisions of the insolvent laws of the State. A decree was rendered in accordance with the prayer of the Attorney-General's petition, and three commissioners, appointed also in answer to said prayer, have now, for more than eighteen months, and for more than one year prior to the application made here by Thornhill for a forced surrender, been in possession of, and administering upon, the assets of the bank, as in a case of insolv-

ency. In the month of May last, Thornhill and others, creditors of the bank, believing that its assets might be better and more equitably administered upon under the provisions of an act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, applied by petition to this court, sitting in bankruptcy, for an order requiring said bank, its president and directors, and said commissioners, to surrender all of the assets of said bank to be administered upon in this court, as in a case of forced surrender in bankruptcy.

The commissioners alone oppose the application. In answer to the petition of Thornhill *et al.*, they say: 1st. That the bank is dead; its charter having been taken from it by the decree of a court of competent jurisdiction, more than a year before Thornhill put on file his petition for a forced surrender. 2d. That the property of the bank is now being properly administered upon under State laws for such purposes long since made and provided.

The 8th Section of the Constitution of the United States provides, among other things, that "Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States."

On the 2d of March, 1867, Congress, in pursuance of the power thus granted, enacted the law entitled "An Act to establish a uniform system of bankruptcy throughout the United States," being Chapter 76 of the second session of the 39th Congress. The 37th Section of said act reads as follows:

"*And be it further enacted*, That the provisions of this act shall apply to all moneyed, business, or commercial corporations, and joint stock companies; and that, upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators, at any legal meeting called for the purpose, or upon the petition of any creditor or creditors, of such corporation or company, made and presented in the manner hereinafter provided, in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors.

"And all the provisions of this act which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporation or company, in relation to the same matters concerning the corporation or company, and the money and property thereof.

"All payments, conveyances, and assignments, declared fraudulent and void by this act, when made by a debtor, shall, in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. No allowance or discharge shall be granted to any corporation or joint-stock company, or to any person, or officer, or member thereof: *Provided*, That whenever any corporation, by pro ceedings under this act, shall be declared bankrupt, all its property and assets shall be distributed to the creditors of such corporations, in the manner provided in this act in respect to natural persons."

Now, this act, under the provisions of its 50th Section, came into full force and effect on the 1st day of June, 1867, one year before the Attorney-General of the State, acting at the instance and request of the bank, asked for a judicial forfeiture of its charter. If, then, the president and directors of the bank had, at the time they instigated action on the part of the Attorney-General, come to the conclusion that the bank was hopelessly insolvent, and that its property should be administered upon as in cases of insolvency, what was it their duty to do? It was, most assuredly, to have made a surrender of the property of the corporation over which they presided, into this court sitting in bankruptcy, to be passed upon as in cases of voluntary surrender under the act. At the time action was taken by the Attorney-General for a forfeiture of the charter of the bank; at the time of the rendering of the decree of forfeiture by the court taking jurisdiction of the same; and at the time of the appointment of the commissioners who now

have possession of the property of the bank, and who here oppose the proceedings of Thornhill and his associates, all statutes of the State of Louisiana touching proceedings in insolvency, insolvent debtors, insolvent corporations, were superseded, and made to be of no effect, by the enactment of the act of March 2, 1867, establishing a uniform system of bankruptcy.

The Sixth District Court of the city of New Orleans had jurisdiction of the action taken by the Attorney-General, as far as the forfeiture of the charter was concerned; but with the decree of forfeiture its jurisdiction ended. It could not go on and administer upon the property of the bank as the property of an insolvent corporation, for the insolvent laws of the State touching corporations, by virtue of which the court could alone act, were no longer in force.

It has been said by counsel for the commissioners that, inasmuch as the bank expired, or became extinct as a corporation at the date of the forfeiture of its charter, no being now exists contradictorily with whom these proceedings can be taken. But this court, looking to the interests of creditors, and to an equitable distribution among them of the property of their debtors, in accordance with the provisions of the Bankrupt Act, will lay hold of such property wherever it can find it; and persons in possession of the same, whether claiming in open wrong, or under a show of title, are parties proper to be made defendants in proceedings of this character. Were it otherwise, any corporation might escape the *regime* of the Bankrupt Act by a simple dissolution or surrender of its charter.

Judgment is therefore rendered in favor of the petitioners in these cases, and a decree will be entered in accordance with the several prayers on file.

Cooley & Phillips, attorneys for petitioning creditors.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

Where assignee had allowed the two members of a bankrupt firm an exemption, under the laws of Missouri, of one hundred and fifty dollars each, out of partnership assets, there being no individual assets, Register disallowed the same, and on application of bankrupt's attorney, certified facts for opinion of the court.

Held, the bankrupts were entitled to the exemption out of partnership assets.

In re BERNARD F. YOUNG AND JOHN M. YOUNG.

IN this case Register Lucien Eaton certifies as follows:

"At the request of George W. Lubke, Esq., attorney in this matter for John M. Young, I make the following statement of facts: At the second meeting the assignee presented his accounts for audit. In them I found two items of one hundred and fifty dollars each to his credit, thus:

By cash exempted to B. F. Young.....$150.
" " " John M. Young.....$150.

"The assignee's papers showing no assets from any source other than the partnership property, which will fall far short of the amount of the partnership debts proved, I was of opinion that money derived from partnership assets was not subject to exemption for the benefit of the separate members of the firm. Therefore, I disallowed the items. No exception was taken by the assignee or the bankrupts. John M. Young had previously presented to me a check for the sum exempted, which I declined to countersign, and told him I thought it could not be allowed. I also told him it would come up at the meeting. He did not attend, I think.

"The meeting was held November 20th, 1869, and the schedules of exempted property were filed the same day. They contain these items as 'exempted under the provisions of Sections 12 and 13, Chapter 63, Revised Statutes of Missouri.' No creditor opposed or objected to the exemption, and the disallowance of the items was of my own motion. My views are as indicated. No statutes of Missouri exempt the joint property of the firm from execution for debts of the firm. There can be no

individual property, properly speaking, in partnership assets, until partnership debts are paid, and the interest of the copartners in the residue ascertained. Here there is no residue. The partnership debts will never be paid in full, and no occasion to adjust the rights of the several partners *inter se* will ever arise. If I am in error in my view of the law, I think the mistake can still probably be corrected."

TREAT, J.—While the foregoing views of the Register would in many cases control the action of an assignee, yet, as the Bankruptcy Act contemplates that the bankrupt shall retain, as exempt, specified property, or its equivalent, in some instances, it is lawful and proper, when there is no *individual* ownership by the head of a family, of the property referred to in Section 11 of the said Missouri statute, to make the allowance out of partnership assets. It is true, as a legal proposition, that the individual interest of a partner in partnership property is as stated by the Register, yet his right of exemption in his *individual* property disregards the otherwise legal rights of his creditors. The policy of exemptions, and the legal rules on which they rest, modify the strict technical rules by which rights of creditors are otherwise enforceable. In this case the exemptions claimed should be allowed.

Hitchcock & Lubke, solicitors for bankrupts.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A firm, originally composed of three members, was dissolved by the withdrawal of one. The two remaining members, constituting a new firm, subsequently filed their petition in bankruptcy. Upon objection being made by the member of the firm who had withdrawn, it was

***Held*, that the court has jurisdiction of the petition of the two parties, though the firm may have been composed of three.**

In re T. P. MITCHELL *et al.*

LOWELL, J.—The bankrupts were partners in trade under the firm name of Mitchell & Moulton, before November, 1868, and

contracted debts which are yet unpaid. In that month they made a new firm by joining with them one George W. Duncan, under the style of Mitchell, Moulton & Co. The firm lasted about two months, when Duncan retired and assigned all his interest in the joint business and effects to Mitchell & Moulton, and they undertook to pay all the joint debts and save Duncan harmless therefrom; and they gave him a mortgage for one thousand dollars on the machinery and fixtures of the late firm, as security for the performance of this undertaking. Mitchell & Moulton continued to be associated together until they lately filed their joint petition in bankruptcy in the usual form as copartners. Their schedules show debts of the first firm of Mitchell & Moulton, and debts of the second firm of Mitchell, Moulton & Co., and none of the last firm. The only joint assets are the machinery and fixtures, valued at three thousand dollars, and mortgaged to Duncan, as before noticed, for one thousand dollars. George W. Duncan appeared before the Register and objected to his proceeding with the cause; and the Register has certified the facts to me, and a brief has been submitted in support of the objections. The point taken is that the court has no jurisdiction of a petition by two partners of a firm of three. I suppose the Register had grave doubts of the jurisdiction, or he would not have certified the case to me. It was not a question arising in the course of the proceedings, but a suggestion by an *amicus curiæ* going to defeat the suit entirely; and as such, proper enough to be certified on the responsibility of the Register.

It is the first time I ever heard that a member of a firm cannot commit a separate act of bankruptcy and become bankrupt without joining his copartners, which appears to be the substance of the objection intended to be taken. But that point does not really arise here, because the bankrupts were partners under the firm of Mitchell & Moulton, and as such have the right to file a joint petition. If they were likewise partners with Duncan in another firm, and he shall apply to have that firm adjudged bankrupt, I suppose the court would have power to consolidate the suits, if expedient, or in some other appro-

priate way to arrange that the greatest convenience to creditors should be arrived at with the least expense. He has not done this, and does not even allege that he is bankrupt.

As regards the injustice that it is said the creditors of Mitchell, Moulton & Co. will suffer if these proceedings are carried on, I am entirely unable to discover it. The rights of all classes of creditors are the same under all forms of proceedings; and, in fact, these creditors appear to have a substantial advantage, because they are secured to the extent of one thousand dollars, which amounts to about fifty per cent. of their debts.

The cause is to proceed forthwith before the Register.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where bankrupt had omitted to include in Schedule B. statement of an interest in an estate in expectancy under a will,
***Held*, discharge must be denied until the same be amended, for which leave is granted, with reference to the Register for that purpose.**

In re FREDERICK F. CONNELL, JR.

BLATCHFORD, J.—The first specification does not allege anything which is made by the 29th Section a ground for withholding a discharge. The third specification is not sustained by the evidence. As to the second and fourth specifications, the bankrupt ought to have included in Schedule B. to his petition his interest under the will of Henry Vanderveer, in the estate left by said Vanderveer, as an estate in expectancy and as property assignable, under the act, to the assignee. But I do not think, on the evidence, that the omission to so include such interest can be held to have been willful, or that either of those two specifications is sustained, or that there is any ground established for withholding a discharge if such interest be included in Schedule B. But as long as such interest is not included in that schedule, it cannot be said, on the evidence, that the bankrupt has conformed to his duty under the act, or

has conformed to all the requirements of the act. The case will be referred back to the Register, with leave to the bankrupt to amend Schedule B. to his petition in the particular indicated, under the direction of the Register.

J. P. C. Cotterill, for the bankrupt.

C. C. Beaman, Jr., for the creditor.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

When an assignment was made by bankrupt, of lands in Florida, for the benefit of such of his creditors only as should sign a compromise agreement, *Held*, void as against assignee in bankruptcy.

In re JAMES E. BROOME.

BLATCHFORD, J.—I think that the assignment executed by the bankrupt on the 10th of October, 1865, of lands in Florida, was made in fraud of his creditors, and that it must be decreed to be void as against the assignee in bankruptcy. It contains a provision appropriating the lands to the payment of such creditors as shall sign a compromise agreement, and of none others, with a direction that the surplus shall then revert to the assignor. It was not an assignment of the whole of the assignor's property. It was void under the laws of Florida as being an assignment to hinder and delay creditors.

John McDonald, for the assignee in bankruptcy.

Alexander and *Green*, for the voluntary assignees.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

The wife of a bankrupt may be summoned and compelled to attend and be examined as any other witness, and may be punished for contempt if she refuses to answer.

In re STAATS D. WOOLFORD.

AT a Court of Bankruptcy, held at the court-house in Catskill,

in said district, on the 17th day of January, A. D., 1870, before Mr. Theodore B. Gates, Register of said court in bankruptcy.

On the 23d day of November, A. D. 1869, Edwin H. Crandell, the assignee in the above entitled matter, filed with the undersigned a written application for the examination of one George Titus, and Olive Woolford, wife of the said bankrupt, which said application was filed, with other papers, in the District Clerk's office, on the 2d day of December, A. D. 1869, and to which reference may be had.

Such proceedings were thereupon had that an alias order was granted, returnable before me at the court-house in Catskill, on the 7th day of January, 1870, which said order is hereto attached.

On the return day of said order, said Olive Woolford appeared by James B. Olney, her attorney, and filed the certificate and affidavit, upon which the examination of said Olive Woolford was adjourned to the 17th day of January instant, when the said Olive Woolford appeared by her said attorney for the purpose of taking the objection, and did take the objection, that the Bankrupt Law does not give the Register authority, nor does it vest in the court any power to require the wife of the bankrupt to appear and be examined, and that there were no sufficient grounds for such examination set out in the application for her examination.

And her said attorney requested that such question might be certified to his Honor the District Judge, for his decision.

And I do so certify it.

THEODORE B. GATES, *Register.*

BLATCHFORD, J.—The wife of the bankrupt must attend, and submit to an examination the same as any other witness, under Section 26. If she does not attend on being summoned, her attendance may be compelled by a warrant to the marshal, under which she may be brought before the Register, and detained until her examination is concluded. If, when she comes, or is brought before the Register, she refuses to answer, she may, under Section 7, be punished for contempt.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where solicitor of bankrupt moved that the assignee be ordered to amend his return in a certain respect, but nothing appeared to show wherein such amendment was proper or necessary, or what interest of the bankrupt would be affected,

Held, the assignee is not required to make the amendment.

In re JAMES KINGON.

To Hon. SAMUEL BLATCHFORD, District Judge.

The above entitled cause is now pending before me. That it appears by the schedules annexed to the petition of the above-named petitioner for adjudication of bankruptcy, and the amendments to the same, that the assets consist of a small amount of money, a few notes, and a large number of book accounts, amounting in the aggregate to about seventeen thousand dollars. There is no proof before me that any part of either of the notes or book accounts are collectible. The assignee, Stephen V. White, made his return on the 10th day of November, 1869, under oath, after the return of the order to show cause why the said bankrupt should not be discharged, the material part of which is as follows, to wit: "That he, said assignee, as assignee of the estate and effects of said bankrupt, has received on account of the said estate the sum of thirty dollars and fifty cents in money, mentioned in the amended schedules of said bankrupt; that he has paid out for account of said estate the sum of nine dollars and fifty cents for the publication of the notice of his appointment as such assignee, which sum has been refunded to him by said bankrupt; that he has also received from said bankrupt the sum of twenty-five dollars on account of his fees as such assignee; that he has also received a portion of the promissory notes mentioned in the amended schedules of said bankrupt, but that all of said notes are, as deponent is informed and believes, barred by the Statute of Limitations, and are by said bankrupt pronounced worthless, and deponent believes them to be of no value whatever; and that deponent, as such assignee, has received no other assets whatever on account of said estate.

The solicitor for the bankrupt, upon petition and the proceedings and proofs in this cause, moves for an order, requiring said assignee to amend his return as follows, to wit: "And that there has also come to my hands certain open accounts due the bankrupt as member of the firm of Kingon & Elmore, as are set forth in Schedule B 3 of amended schedules, which open accounts amount in the aggregate to seventeen thousand seven hundred and eight dollars and sixty-seven cents. I have made no effort to collect the same or any of them, and have no knowledge that they can or cannot be collected."

The decision of this motion involves the questions of the rights, powers, and duties of an assignee, and the power of the courts over them and their proceedings. It is to be regretted, that the framers of the Bankrupt Law did not, in defining the duties of the assignee, more fully state the power and duty of the court to control his action, and to compel his obedience to its orders, but the law and practice of the courts gives sufficient power to the courts for all practical purposes to compel the assignee to obey its orders.

In England, the courts hold an assignee to be a person appointed by the court during the pendency of a suit, to do and perform certain acts under the direction and order of the court, or under the provisions of some statutory enactment. (Wyatt's Prac. Register, 355.) He is an officer of the court (*Matter of Burke*, B. & B., 74), and cannot be disturbed by anybody without leave of the court. (*Fairfield* v. *Weston*, 2 S. & S., 93; *Bryan* v. *Cormack*, 1 Cox, 422; *Wardel* v. *Loyd*, 2 Molloy, 388; *Hutchinson* v. *Lord Bassarene*, 2 B. & B. 55; M. S. case of *Broad* v. *Wickham*, 1 Smith's Ch. Prac. 500.) His appointment was provisional only, and was subject at all times, upon proper cause shown, to removal by the court. (*Skipp* v. *Hamond*, 3 Atk., 564; *Cooke* v. *Gwynn*, 3 Atk., 690.) He was appointed by the court as an indifferent person, and as an officer of the court, to act on behalf of all the parties in interest. (*Davis* v. *Duke of Marlborough*, 2 Swanst., 125.) The court itself had the care of the property in dispute, or effects of the estate, and the assignee was

but the creature of the court. If he was interfered, intermeddled with, or threatened with violence, the court would protect him, and punish whoever molested him. (*Fitzpatrick* v. *Eyre*, 1 Molloy, 171.) Such was the practice of the English courts until the passage of the English Bankruptcy Acts of 23 and 24 Vic., C. 134, and 12 and 13 Vic., C. 106, provide that the majority in value of the creditors who have proved their debts may choose an assignee subject to the approval of the court. A similar provision was unfortunately contained in the insolvent laws of this State, usually known as the two-third act, allowing the creditors to petition the court for the appointment of a person as assignee, naming the person whose appointment they requested. It was optional with the court to appoint the person so named, or to appoint some other person. He was an officer of the court subject to removal by the court, had no powers except such as were conferred upon him by law, and by the practice of the court, *Verplank* v. *Mercantile Ins. Co.*, 2 Paige, C. R., 452, and, under the order and direction of the court, exercised similar powers and duties as an assignee now does under the Bankrupt Act. The innovation upon the practice under the English common law of the courts appointing trustees, assignees, receivers, etc., caused by the passage of the English Bankrupt Act, was seriously felt by the loss of thousands upon thousand of dollars by creditors of estates, when assignees were chosen by the creditors, as the courts appointed fit and proper persons, assignees to execute the trust, whereas the creditors usually choose some respectable but inefficient person, through whose inefficiency large sums were lost to estates, which an efficient person would have collected. The same was true of assignees under the Bankrupt Act of April 4th, 1800, and under our late insolvent laws, which laws have been superseded by the Bankrupt Act of March 2d, 1867. The same fatal defect, the unfortunate provision allowing creditors to choose an assignee, is contained in Section 13 of the Bankrupt Act of March 2d, 1867. I think it safe to say, that owing to this unfortunate provision, full one-fourth of the assets of bankrupts have been lost to the creditors, when, had the Bankrupt Act

conferred upon the Registers the appointment and control of the assignees, immense sums of money would have been collected, where, under the law as it stands, assignees do not make any effort whatever to collect; this is the uniform opinion of the Registers and the attorneys practicing in this court, as well as creditors who have learned a sad lesson by experience. By the Bankrupt Act of 1841, the court appointed the assignees. By the English Bankrupt Act, the court could make any order to secure the proper fulfillment of the duties by the assignee, which was the reason why such large dividends were paid out of estates which were administered under said law, and could compel the assignee to execute any instrument necessary and proper in the proceedings in a cause; could punish him for any disobedience to any order or decree of the court, as for a contempt of court; such power was in the discretion of the judge in bankruptcy, who is an officer of the court of bankruptcy in England, having the same powers under the English law as a Register in bankruptcy has under the American Bankrupt Law of March 2d, 1867. (*Ex parte* Bates, 21 Law J. Bank. 20, 16; Jurist, 459.)

The identical power is given to the court by Section 18 of the Bankrupt Act of March 2d, 1867, as follows: "That the court, after due notice and hearing, may remove an assignee for any cause which, in the judgment of the court, render such removal necessary or expedient."

"An assignee refusing or unreasonably neglecting to execute an instrument when lawfully required by the court, or disobeying a lawful order or decree of the court in the premises, may be punished as for a contempt of court."

By Rule 19 of the General Orders in Bankruptcy, the duties of an assignee are in a measure defined, and his actions governed by the order of the court. An assignee cannot even designate a newspaper in which to publish the notice of sale of the bankrupt's estate. Such papers must be designated by the court or Register (Section 28, Bankt. Act, and General Orders, 21), and may also by an order authorize the assignee to sell "any specified portion of the bankrupt's estate at private

sale." And in making sales of real estate, the court or Register can authorize the sale thereof in parcels, and may, under the direction of the court, submit any controversy arising in the settlement of the demands against the estate, or debts due it, to the determination of arbitrators, etc. (Section 17, Benedict, U. S. Circuit Court Repts., Vol. II., 100.) The court, after due notice and hearing, may remove an assignee for any cause which in the judgment of the court renders such removal necessary or expedient. That an assignee may, with the consent of the court, resign his trust and be discharged therefrom. Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court. From the authorities above quoted, and the sections of the Bankrupt Act above cited, it is plain that an assignee is an officer of the court, subject to its control, and can be removed by the court for any good cause shown, and must obey the orders of the court, and when he so obeys, he is protected by the court. Assignees will find it to their advantage to take the orders of the court when they contemplate doing any important act, that the Registers should explain to them their duties, as the Registers are familiar with the duties required of assignees. Any person interested in the acts of an assignee may apply to the court for an order requiring of such assignee the specific performance of any of his duties; and that in this case I have the power at this stage of the proceedings to grant the order asked for. (*H. Gettleston*, 1 N. B. R., 604.) As it was plainly the intention of Congress to give the Registers, acting as assistant District Judges, the same power in all respects in cases pending before them, that the District Judge has. Such has been the uniform decision of all the District Judges and the Registers who have written on the subject. Such power was absolutely necessary to be given to the Registers in order to enable them to discharge the judicial duties devolving upon them. It would be an intolerable burden placed upon the District Judges if, in addition to their present onerous duties, they were compelled to hear and decide the great number of applications necessarily made to the (Register) court during the pendency of causes

before them. It would occupy the entire time of the judges in hearing motions and granting necessary orders, which judicial duties, by the Bankrupt Act and the decisions of the courts, the Registers are required to perform. (1 N. B. R., 604.) Experience has shown that the Bankrupt Act and the decisions of the court have not conferred too much power upon the Registers, but, on the contrary, too little; and the amendment of the Bankrupt Act, giving the Registers the entire administration of the law, would immensely facilitate the transaction of business, and relieve the District Courts of an intolerable and unnecessary burden. Appeals from the Register's decision should be to the District Court in the same manner as appeals are now taken from the District to the Circuit Court.

The Supreme Court of this State, General Term, first Judicial District, Ingraham, J., held that an assignee was an officer of the court, and it was the duty of the court to make all orders to secure the proper fulfillment of his duties, and such has been the uniform decision of all our State courts. The right, duty, and power of the court to control the action of assignees is clearly given by Section 18 of the Bankrupt Act, and is also in the inherent power of the court to exercise a sound discretion and controlling jurisdiction over its officers and suitors, as well as the subject matter of the action in any proceeding pending before it. (18 Wend., 652; 1 Denio, 659; 11 Johnson, 254; 1 Gra. Prac., 3d ed., 671 to 675.) In this case it is no hardship asked of the assignee to make the amended return asked for. It is right, just, equitable, and proper that he should do so, and a refusal on his part would be unjust, oppressive, and improper, and the petitioner has a right to ask that it be done; at the same time the assignee must be paid a proper compensation, to wit: the sum of ten dollars, therefor. I therefore hold that the assignee, Stephen V. White, upon the payment to him of ten dollars, must make and execute under oath and deliver to the Register an amended retnrn containing the amendments asked for, which amended return will be of the date of the original return, and to be executed *nunc pro tunc.*

The assignee, by his counsel, contends that the return already made is all the return, if any, he is compelled to make.

JOHN FITCH,
Register.

BLATCHFORD, J.—No reason is shown why the assignee should make the addition suggested to his return, nor is it shown how such addition is proper or necessary, or what particular object is to be subserved by his making it, or what interest of the bankrupt is to be promoted by making it, or to be injured by not making it. I therefore decide that the assignee is not required to make it.

The clerk will certify this decision to the Register, John Fitch, Esq.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

The adjudication is not conclusive upon a fact which goes to defeat the jurisdiction of the court over the supposed bankrupt.
An alien resident within the United States may take the benefit of the Bankrupt Law.
Such person need not have resided within the district in which application is made for a period of six months.

In re JOSEPH GOODFELLOW.

LOWELL, J.—Joseph Goodfellow, the bankrupt, was born in the province of New Brunswick, and he resided there until last December. In 1868, he became a partner with one Stone, whose domicile was in New Hampshire, in a trade between the British provinces and Boston, and the firm owe debts here. In December, the bankrupt was arrested in Boston, and gave a recognizance, according to the law of the State, to appear before a magistrate within a certain time, and take the oath for the relief of poor debtors. He afterwards applied to take the oath, and pending the hearing thereon, petitioned this court on the 5th of January, to be adjudged a bankrupt, alleging that he resided in Boston, and had carried on business there for fourteen months next preceding the date of his petition.

He was duly adjudged a bankrupt accordingly, but the first meeting has not been called, nor has an assignee been appointed. The creditor at whose suit he was arrested, now petitions that the proceedings may be vacated for want of jurisdiction, alleging the debtor to be a non-resident alien.

The point is taken on behalf of the bankrupt, that the adjudication itself is a conclusive finding of all the facts necessary to support it. No doubt the petition is conclusive evidence that the debtor is insolvent, and desires to take the benefit of the act, and perhaps the fact that he owes three hundred dollars, may be conclusively found by the adjudication; but upon a fact which goes to defeat the jurisdiction of the court over the supposed bankrupt, it cannot be so. Such a fact as that may be shown by plea and proof in any court by a person not estopped to show it, and it cannot be that the only exception is of the court in which the void proceedings themselves are pending, nor is the adjudication binding as a judicial decree, which must be impeached, if at all, in a higher court. It is made *ex parte*, without notice to creditors, and is entirely under the control of this court, upon due proof that it ought to be annulled, at least in this stage of the cause.

The decision, then, depends upon the soundness in fact and in law of the petitioner's objections to the bankrupt's right to apply to this court, which are that he is not a resident of Boston, and if he is, that he has not been so for six months, and in either case is not within the statute.

Section 11 makes every person residing within the jurisdiction of the United States who owes a certain amount of debts subject to the act, and it is not denied that resident aliens are here included. (*Judd* v. *Lawrence*, 1 Cush., 531.) If confirmation were needed, it is found in the latter part of the same section, which prescribes a special form of oath for citizens of the United States; clearly showing that some others than citizens are capable of being petitioners. But it is said that an alien must have resided for six months within the district before he can apply to the court. If the requirement were unqualified that the application must be in the district wherein

the debtor has resided for the six months next before the filing of his petition, it might be a necessary inference, though one which would lead to most unfortunate consequences, that a debtor who had changed his residence within six months could not apply at all, notwithstanding the previous words which include all persons residing within the jurisdiction of the United States. But the qualification is not absolute, it is for the six months "or for the longest period during such six months," and the meaning is plain, that if the debtor has changed his residence within the United States, during the six months, he must apply in that district in which his residence has, during that time, been the longest. And as if he has had but one residence within the United States of less than six months, his application in the district where he resides, is made in the district in which he has resided the longest, though it be made on the day after his residence was established. As if a citizen of the United States, residing abroad, but trading here, returns to his native domicile and files his petition immediately. Or in the case before Judge Blatchford, where a firm had carried on business in New York for only two months out of the six. (*Re* Foster *et al.*, 3 N. B. R., 236.) If, then, a person resides within United States and no district can be shown in which he has had a longer residence (within six months) than that in which he petitions, he has chosen the proper district.

I assume, for the purposes of this case, that the residence mentioned in the first part of Section 12 is equivalent to domicile, which was its meaning under the insolvent law of Massachusetts (*McDaniel* v. *King*, 5 Cush., 469); and that an alien who has never lived here at all, though he may have traded here through agents, could not be made bankrupt here even if he might happen to be temporarily within the jurisdiction. The law is otherwise in England, because strangers or aliens have been included in terms, in all their statutes of bankruptcy since that of James I. But our statute has followed that of Massachusetts in this respect, though in the matter of this six months, or longest period, it is based on that of England.

But it is not necessary to pass upon this point, nor to inquire whether any residence, short of the acquisition of domicile, would, under any circumstances, fall within the act, because upon the evidence, which comes wholly from the debtor himself, who was examined orally before me, and which I have carefully considered but need not recapitulate, I feel bound to hold that he was a resident here on the 5th of January.

The creditor's petition is dismissed, and the cause will proceed before the Register.

J. Knowles, for the creditor.

Mr. Wiggin, for the bankrupt.

SUPREME JUDICIAL COURT—WORCESTER, MASSACHUSETTS.

The insolvent laws of the commonwealth were not superseded until June 1, 1867, by the United States Bankrupt Law, approved by the President, March 2, 1867, U. S. St., 1867, C. 176.

NATHANIEL C. DAY *v.* SAMUEL D. BARDWELL *and others.*

BILL in Equity to set aside proceedings instituted under the insolvent laws of the commonwealth, March 18, 1867, by Abner Woodward, George P. Carpenter, and Walter W. Carpenter, three of the respondents, upon which the judge of insolvency immediately afterwards issued a warrant, and caused notice to be published, and subsequently assigned the estate of said debtors to Samuel D. Bardwell and Humphrey Stevens, who also were made respondents to this bill. The complainant, who had previously attached property of the debtors in an action still pending, alleged that the proceedings in insolvency were void because the insolvent laws of the Commonwealth and the authority of the judge of insolvency to issue warrants or make adjudications of insolvency had been wholly superseded by the Bankrupt Act, U. S. St., 1867, C. 176. The respondents filed a general demurrer, and the case was reserved by Chapman, J., for determination by the full court.

G. W. Bartlett, for the respondents.

G. F. Hoar and *F. P. Goulding*, for the complainant.

When the petition of the respondents Woodward and Carpenter was filed, the United States Bankrupt Law was so far in operation that the Massachusetts insolvent law was superseded. The United States law, being approved March 2, 1867, took effect on that day, except so far as otherwise therein expressly provided. (1 Kent's Com. (6th ed.), 454.) From and after that date there was, under the supreme authority of Congress, a complete bankruptcy system in force, defining the conditions of discharge, vesting rights in creditors, securing rights thereafter to be enforced by assignees, affecting and regulating the transfer of property, prescribing rules of conduct for debtors, and guarding such rules by penalties which Congress had no constitutional power to impose except in aid of and as part of a system of bankruptcy. For public convenience, the institution of proceedings for the relief of debtors or for securing the rights of creditors was postponed for a short time, just as Congress might have provided that petitions should be presented only to the circuit courts in term time; but in every other particular the system was in full force. (U. S. St., 1867, C. 176, Sections 29, 35, 39, 44, 50.)

The concurrent operation of the Massachusetts insolvent law with such a system was impossible. The power of Congress over the subject of bankruptcy, when exercised, is exclusive and supreme. The system it establishes must be uniform. (U. S. Const. Art. 1, Section 8; Federalist, No. 32; *Sturges* v. *Crowninshield*, 4 Wheat., 122; *Ogden* v. *Saunders*, 12 Wheat., 264; Story on Const., Section 1109; *Griswold* v. *Pratt*, 9 Met., 16.) Therefore at the time of the adjudication by the State judge, declaring these debtors insolvent and ordering their property to be sequestered and divided on certain principles among their creditors, preferring some to others, requiring conveyances from the debtors to carry into effect such orders and preferences, prohibiting certain other acts on the part of the debtors, dissolving certain liens on their property, and discharging on certain conditions a considerable portion of their debts, a law of the United States was in force, providing that, if any one of numerous acts specified therein should have been

committed by these debtors, their property on June 1 thereafter might be sequestered by a different power, marshaled on different principles, and distributed among different persons, with different conditions affixed to the discharge. Suppose a debtor to have committed an act of bankruptcy on May 1, 1867. His Massachusetts creditors might well have contended for a right, as a result of that act, on June 1, to cause him to be adjudged a bankrupt, his property to be divided among them, and certain stringent conditions to be annexed to his discharge. Could the debtor voluntarily submit himself to another tribunal and be discharged by it of his debts on different conditions? It manifestly could not be maintained that the States might pass laws after the United States law had gone into full effect, declaring acts to be acts of bankruptcy which were not such under the United States law.

The act of bankruptcy vests in the creditor the right to his subsequent remedy. *Shawhan* v. *Wherritt*, 7 How., 627. There are many acts which the Massachusetts system and the United States system in common make acts of bankruptcy. The adjudication by a court of competent jurisdiction is conclusive as to all the world. *Denny* v. *Mattoon*, 2 Allen, 361. *Merriam* v. *Sewall*, 8 Gray, 316. Johnson, J., in *Ogden* v. *Saunders*, 12 Wheat., 366. What is to be the effect of an adjudication by the State court dismissing a petition on the ground that the alleged act of bankruptcy is disproved? If it is to protect the debtor, it ousts the jurisdiction of the United States and is binding on foreign creditors. If it does not protect the debtor, that must be by force of the United States law conflicting with and overriding the State jurisdiction.

By Section 1 of the United States law provision is made for the collection of all assets. By Section 14 "all property conveyed by the debtor in fraud of his creditors" vests in the assignee. By the State law the same is to pass to the State assignee. Suppose the State assignee has it, must he give it up? Suppose neither has it; which shall recover it? By Section 15 of the United States law "the assignee shall demand and receive from any and all persons holding the same, all the estate

assigned or intended to be assigned under the provisions of this act." By Section 16 of the United States law, the assignee shall be admitted to prosecute actions in his own name which were pending in the debtor's name at the time of the commencement of the proceedings in bankruptcy. The State law contains a like provision. Which shall come in? Further, does a discharge under the State law bar the right of creditors to prove in United States bankruptcy proceedings?

Our position may be summed up thus: 1st. There cannot be two systems defining duties and prohibiting acts, administered by distinct tribunals, and vesting the same rights in the same property in different persons, in force at the same time and applicable to the same subject. 2d. That system cannot be uniform throughout the country, which leaves in force in some States additional and supplementary provisions not existing in others.

A State insolvent law, as against the law of the United States, is of no higher authority than a voluntary conveyance. *Cornwall's appeal*, 7 W. & S., 305. The conveyance ordered in this case by the State court was in conflict with provisions of the United States law and was prohibited by it. If the United States have prohibited a debtor from disposing of and distributing his estate in a certain way, no State law can authorize him to do it, or can do it for him. The debtor must be held to intend the legal consequences of his acts. If he makes by order of the State court a conveyance of his property, knowing himself to be insolvent, and intending that his property shall be distributed thereby in a different manner from that provided by the United States Bankrupt Law, the conveyance is void and the assignee in bankruptcy may set it aside. If it be said that the practical inconvenience follows that a period of time was left in which a debtor had no remedy, it is a sufficient answer to say that Congress did not see fit to make a special provision for those States which had Bankrupt Laws already in force, and that the other States required no such provision.

GRAY, J.—The question which lies at the foundation of this

bill is, At what time did the United States Bankrupt Law of 1867, approved by the president on the 2d of March, 1867, take effect so far as to prevent the institution of proceedings by an insolvent debtor under the insolvent laws of the commonwealth? And, notwithstanding the ingenious arguments which have been presented in support of a different construction, we are unanimously of opinion that it did not so take effect until the 1st of June, 1867.

It is well settled that the power granted to Congress by the Constitution, to establish uniform laws on the subject of bankruptcies throughout the United States, does not, until the power is exercised and such laws are put in operation by Congress, exclude the right of the States to pass similar laws; and that the operation of State insolvent laws is therefore superseded, and suspended, so far, at least, as the two are applicable to the same persons, as soon as a national bankrupt law has taken effect, and not before. (*Sturges* v. *Crowinshield*, 4 Wheat., 122. *Ogden* v. *Saunders*, 12 Wheat., 213. *Ex parte* Eames, 2 Story, 322. *Judd* v. *Ives*, 4 Met., 401. *Griswold* v. *Pratt*, 9 Met., 16.)

A statute doubtless takes effect from the day of its approval by the Executive, unless its operation is postponed by the provisions of the same or of some other law to a future day. But the Bankrupt Act of 1867 contains peculiar provisions which prevent it from falling within this general rule. The great object of all bankrupt or insolvent laws is to distribute the property of a debtor who is unable to pay his debts in full, among his creditors, by judicial proceedings in which all may be heard, and to discharge his property afterwards acquired, or at least his person, from the debts owed by him at the time of the institution of such proceedings. As was said by Mr. Justice Johnson, delivering the opinion of the Supreme Court of the United States in *Ogden* v. *Saunders*, 12 Wheat., 366, "Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to a hearing. Hence every system, in common with the particular system now before us, professes to summon the creditors before some tribunal, to show

cause against granting a discharge to the bankrupt." Under the existing Bankrupt Law of the United States, no judicial proceedings for the sequestration and distribution of the debtor's property, or for granting him a discharge, could be instituted until the 1st of June, 1867; for by the express terms of the proviso at the end of the last section, which qualifies the whole statute, "no petition or other proceeding under this act shall be filed, received or commenced before" that day.

It was argued that this clause was analogous to a provision requiring petitions in bankruptcy to be presented in term time only, and that in every other particular the system was in full force immediately upon the passage of the statute. But such a construction is inconsistent with the express provisions and the manifest purpose of the law. The 1st and 2d Sections provide that the District and Circuit Courts of the United States shall be always open for the transaction of business under this act, and that the powers and jurisdiction conferred by it may be exercised, as well in vacation as in term time, by the court, or by a judge at chambers. Like facilities for beginning proceedings are afforded by our insolvent law and by the English Bankrupt Act, and are essential to the efficient administration of any system of bankruptcy, for without them a fraudulent debtor might easily conceal or remove his property and depart out of the jurisdiction before a warrant could be issued. It would require very explicit language to satisfy us that Congress intended to abolish or supersede all local bankrupt or insolvent laws, four months before it established any general system of judicial proceedings in their place.

The enactment of the last section, by which "this act shall commence and take effect as to the appointment of officers created thereby, and the promulgation of Rules and General Orders, from and after the date of its approval," implies that it was not to take effect at that time in other respects as to which no special provision is made; and was evidently intended merely to allow the necessary officers to be appointed and suitable rules and orders established in advance, so that the complete system might go into effect at once when the time for instituting judi-

cial proceedings should arrive, which, without some such express authority, could not have been done. *Commonwealth* v. *Fowler*, 10 Mass., 290. Opinion of Justices, 3 Gray, 606, 607.

That Congress did not consider or intend that the law should go into general operation before proceedings could be commenced under it is made manifest by the provision of the 33d Section that "in all proceedings in bankruptcy commenced after one year from the time this act shall go into operation" no discharge shall be granted to a debtor whose assets do not pay fifty per cent. of his debts, without the written assent of a majority of his creditors." As the act speaks from the time of its passage, the use, in this section, of words in the future tense, "shall go into operation," is inconsistent with the hypothesis that the statute goes into operation presently upon its passage, and clearly indicates that the time intended is the day when proceedings may first be commenced.

The other provisions of the statute to which we have been referred (assuming them to be within the constitutional power of Congress, and binding according to their terms, from "the time of the passage of the act"), apply only to cases in which proceedings are actually instituted on or after the 1st of June, and do but define the foundation, regulate the conduct, and tend to secure or promote the efficiency of such proceedings. The 29th and 39th Sections specify what acts done by a bankrupt after the passage of the statute shall, after the system shall have been put in full operation, enable his creditors to apply to the court for an adjudication of bankruptcy, and prevent his obtaining a discharge. The 44th Section punishes as misdemeanors certain acts of concealment or destruction of property by the bankrupt after the commencement of proceedings, or of fraudulently obtaining property on credit or disposing of property so obtained, within three months before such commencement. The 35th Section (nearly corresponding to our own General Statutes, C. 118, Sections 89, 90) provides that if the debtor shall make to any person, with notice of his intent, certain fraudulent preferences, within four months, or payments or transfers to defeat the operation of the statute, within six

months before the filing of the petition by or against him, the same shall be void, and the assignee may recover back the property or its value. The only effect of this section is to enable the acts therein enumerated to be avoided by an assignee subsequently appointed under proceedings in bankruptcy. *Gardner* v. *Lane*, 9 Allen, 497. *Seaman* v. *Stoughton*, 3 Barb. Ch. 349.

It was argued that an assignment by the judge of insolvency under the statutes of this commonwealth, after the 2d of March and before the 1st of June, would be in conflict with and prohibited by the provisions of the Bankrupt Law. But we find nothing in this law to warrant such an inference. An assignment under our insolvent laws is the act of the law, not of the party; executed by the judge, not by the debtor; to secure his property for equal distribution among his creditors, not to defraud or deprive them of any part of it; and the confirmatory instruments which the debtor may be required by the assignee and ordered by the judge to execute, are equally made by legal authority and direction. Gen. Sts., C. 118, Sections 42, 70, 71. Property included in an assignment from the judge of insolvency, which has taken effect before proceedings in bankruptcy are or can be instituted, no longer belongs to the debtor. If such proceedings are afterwards instituted, property which has already been so assigned is no part of "the assets of the bankrupt," which may be collected under authority of the United States Court according to the 1st Section of the Bankrupt Law; nor of "the estate, real and personal, of the bankrupt," or "the property conveyed by the bankrupt in fraud of his creditors," which will pass by an assignment from a judge of that court under the 14th Section (for it has vested by legal proceedings in a trustee for creditors, who does not hold under and is not affected by the fraudulent title); nor of "the estate assigned or intended to be assigned under the provisions of this act," which the assignee in bankruptcy is entitled by the 15th Section to demand and receive; nor "a debt or other thing which might or ought to pass to the assignee by the assignment" in bankruptcy, for which an action pending in the name of the debtor

at the time of the commencement of proceedings in bankruptcy may be prosecuted by such assignee under the 16th Section.

This case does not require us to consider what effect an adjudication by the court of insolvency upon the petition of a creditor alleging an act of bankruptcy, or upon the application of the debtor for his discharge, may have upon the determination of like questions arising in proceedings afterwards commenced under the Bankrupt Law. The effect, whatever it may be, which the judgment of a State court upon a question within its jurisdiction may have, directly or indirectly, in similar proceedings in the court of the United States, has no tendency to take away or diminish the authority of the laws and the tribunals of the State, before the courts of the United States have been vested with any jurisdiction whatever over the subject.

The laws established by Congress on the subject of bankruptcies, under the power conferred by the Constitution, must indeed be uniform throughout the United States. But the extent to which this power shall be exercised rests in the discretion of Congress; uniformity is required in the national legislation only, and the laws of the several States may be left in force so long and to such extent as Congress may see fit. In the Bankrupt Law of 1841, liens created according to the peculiar laws of the several States, by levy of execution, or by attachment on mesne process, even after the Bankrupt Act had taken full effect, were preserved, if existing before the actual institution of proceedings in bankruptcy in the case of the particular debtor. *Savage's assignee* v. *Best*, 3 How., 111. *Peck* v. *Jenness*, 7 How., 612. *Davenport* v. *Tilton*, 10 Met., 320.

We have discussed the question presented by this bill as if it were a new one. But it seems to us to have been settled, in substance and principle, by the adjudications upon the Bankrupt Act of 1841. That act, which was passed on the 19th of August, 1841, and by its 17th Section was to "take effect from and after" the 1st of February, 1842, declared in the 2d Section that "all future payments, securities, conveyances, transfers, or agreements," by any bankrupt in contemplation of bank-

ruptcy, for the purpose of giving a preference, or without valuable consideration, should be void; the assignee in bankruptcy might recover the property, and the bankrupt should receive no discharge. The word "future" in that section was held by Mr. Justice Story and by this court to include all preferences given after the passage of the act, even before it took effect, according to the 17th Section. *Hutchins* v. *Taylor*, 5 Law Reporter, 289. *Swan* v. *Littlefield*, 4 Cush., 574. The same section contained a further provision, which was assumed to be valid by Mr. Justice Story in *Hutchins* v. *Taylor*, 5 Law Reporter, 293, that a bankrupt who had, since the 1st of January, 1841, or at any other time, in contemplation of the passage of a bankrupt law, given a preference to a creditor, should not upon his own voluntary application receive a discharge without the consent of a majority of the creditors not so preferred. And the 4th Section declared that no person who should apply trust funds to his own use, or, being a merchant, banker, factor, broker, or underwriter, should not keep proper books of account, "after the passing of this act," should be entitled to a discharge. See *In re* Tebbetts, 5 Law Reporter, 267. *Chapman* v. *Forsyth*, 2 How., 207, 208. Yet this court sustained proceedings in insolvency which were commenced and notice of the issuing of the warrant in which was published in December, 1841, four months after the passage of the Bankrupt Act, and in which the assignment was not made until the 7th of February, 1842, after that act had gone into full operation. *Judd* v. *Ives*, 4 Met., 401. See also *Ex parte* Eames, 2 Story, 325. *In re* Holmes, 5 Law Reporter, 361. *In re* Horton, *Ib.*, 462. *Larrabee* v. *Talbott*, 5 Gill, 426.

The cases cited for the plaintiff are quite distinguishable from this. Cornwell's *Appeal*, 7 W. and S., 305 (without regarding the fact that it has been overruled by the court which made it, in *Weiner* v. *Farnum*, 2 Barr, 146, inasmuch as this was upon grounds inconsistent with the decisions in *Hutchins* v. *Taylor*, and *Swan* v. *Littlefield*, above cited), was a case of a voluntary assignment by which some creditors were preferred, and therefore affords no guide in the case of a judicial assignment under

legal proceedings. In *Shawhan* v. *Wherritt*, 7 How., 627, the proceedings in the State court were by suit in equity, commenced after the Bankrupt Law had taken effect, and with notice of the act of bankruptcy on which proceedings in bankruptcy were afterwards instituted.

As the assignment by the judge of insolvency, which this bill seeks to set aside, was made and took effect before the 1st of June last, when the Bankrupt Act went into operation, though since the 2d of March, the date of its passage, the order in this suit must be, *Demurrer sustained.*

UNITED STATES DISTRICT COURT—MINNESOTA.

Where a voluntary bankrupt, after January 1, 1869, applied to the court upon his petition and schedule, before the day of first meeting of creditors, to have his assets appraised and determined as being in excess of fifty per cent. of provable claims, etc.,

Held, the application must be denied, no debts appearing to have been proved, and no present action of the kind asked could affect the question of the bankrupt's discharge.

Section 33 should be construed, in relation to the word "assets," as if it read, "The proceeds of the bankrupt's property in the hands of the assignee, and subject to be divided among his creditors, must be equal to fifty per cent. of claims," etc.

5 B.R. 917.

In re JOHN FREIDERICK.

NELSON, J.—The solicitors for the bankrupt have presented a petition to this court claiming that the amount of the assets assignable under the Bankrupt Law are equal to fifty per centum of the provable claims against the estate of the bankrupt, and ask that appraisers be appointed by the court to ascertain the value of the assets of the bankrupt, for the due and just protection of his rights in the premises.

This application is based upon the petition and schedules of the debtor, on file, which give a list of his debts, and the value of his estate, in accordance with the provisions of the Bankrupt Act, and is made for the purpose, as is alleged, of showing the bankrupt to be one of the class of persons entitled to a discharge when applied for, under the second clause of the 33d Sec-

tion of the Bankrupt Law. This section, as amended July 27, 1868, reads as follows: "In all proceedings in bankruptcy commenced after the 1st day of January, 1869, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors, to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case, at or before the time of the hearing of the application for discharge."

It is impossible, at the present stage of the proceedings in this case, to ascertain what are the assets of the bankrupt, and whether they are equal to the amount required, so as to bring him within the 33d Section. There is no evidence before us that any claims whatever have been proved against the estate. The earliest period designated in the warrant issued upon the adjudication of bankruptcy, at which time creditors are summoned to prove their debts, has not yet transpired. No assignee has been appointed whose duty it will be to possess himself of all the bankrupt's estate; and the bankrupt, under the 19th Section, cannot, as yet, apply for a discharge. It would seem, therefore, that there was no necessity for the court, at present, to make any inquiry as to the assets of the estate.

The solicitors for the bankrupt, however, claim that the estate can now be readily appraised, or at least that portion of it which is stated in the schedules, and which, under the bankrupt's surrender, is in possession of the Register. They believe a fair appraisement will show this portion of the estate fully equal to fifty per centum of all provable debts. Even if such was the case, we do not see how it could influence the question of granting a discharge to the bankrupt.

The 33d Section, before the amendment referred to above, declared that in bankruptcy proceedings commenced after one year from the time the act went into operation, "no discharge shall be granted to a debtor whose *assets* do not pay fifty per centum of the claims against his estate, unless," etc. The plain and obvious meaning of "assets" in this section, was *the pro-*

ceeds of the debtor's property which are applicable to the payment of his debts.

The subject-matter of this section points to this signification of the word. Nothing else could pay debts. It may be true that in other portions of the act the word "assets" has been used in a more enlarged sense, but, in this section, it clearly is not synonymous with "estate." The amendment of July, 1868, although more favorable to the bankrupt, has not changed the meaning of "assets," and, according to our view, the section as it now stands, is to be construed as if it read: "*The proceeds of the bankrupt's property in the hands of the assignee, and subject to be divided among his creditors, must be equal,*" etc. In bankruptcy proceedings commenced before January 1, 1869, discharges are granted without reference to the assets of the bankrupt. If no debts have been proven, or if no assets have come to the hands of the assignee, the discharge can be granted upon application made after the expiration of sixty days from the adjudication of bankruptcy.

The Supreme Court of the United States declare a bankrupt to have "no assets" when the assignee makes oath that he has "not received or paid out any *moneys* on account of the estate." (See Form 85.) The adverse proposition must also be true, and a bankrupt has assets, when the assignee has received or paid out *moneys* on account of the estate; if the *moneys* received or paid out equal fifty per centum of the claims proved against the estate, upon which the bankrupt is liable as principal debtor, a discharge will be granted upon the proper application.

We do not think that any relief can be given now, and deny the prayer of the petition.

Phelps & Taber, bankrupt's solicitors.

UNITED STATES DISTRICT COURT—S. D. MISSISSIPPI.

In Mississippi, husband gave promissory note to the trustee of wife, for alleged balance on account stated between them, growing out of the use of the separate personal and real property of the wife, and executed a deed of trust on certain land of the husband to secure payment of the note, and subsequently went into voluntary bankruptcy. On petition of assignee and a secured creditor,

Held, the said conveyance must be held to be fraudulent and void as to existing creditors at the time it was made.

Semble, even if the wife's claim was valid under the laws of Mississippi, the effect of the conveyance would be to delay and hinder creditors, and enable the debtors to obtain an inequitable advantage over them, and so void.

SARAH GILLESPIE *v.* THEODORE MCKNIGHT *et al.*

HILL, J.—This cause is considered as on bill, supplemental bills, answers, and proofs, from which it appears that on the 5th day of January, 1856, said Theodore McKnight, with Hamilton McKnight and W. F. Cain, as his sureties, executed their note to Sarah Gillespie, for the sum of one thousand dollars, with ten per cent. interest, payable twelve months thereafter, the same being for borrowed money. Upon this note the interest was paid annually, up to the 1st day of January, 1860, together with two hundred dollars of the principal debt. On the 23d day of May, 1866, said Theodore and Hamilton McKnight entered in the office of the Clerk of the Circuit Court for the county of Amite, an office confession of judgment for the sum of eight hundred and thirty-two dollars and twenty-five cents upon said note, which was by the said court confirmed on the 2d day of June thereafter. Upon this judgment an execution was issued, and on the 17th day of January, 1868, levied upon the lands mentioned in the bill. The said judgment was, soon after its rendition, enrolled in Amite county, in the proper office. On the 29th day of February, 1868, said Theodore McKnight filed his petition in bankruptcy, and was soon thereafter adjudged a bankrupt thereon. On the 17th day of March, 1866, said Theodore McKnight executed his note to John F. Hamilton, as trustee for his wife, Hannah McKnight, for the sum of three thousand six hundred and sixty-

seven dollars and seventy cents, payable two years thereafter; and at the same time executed to said John F. Hamilton a deed of trust upon the lands mentioned in the bill, to secure the payment of said note, being in all nine hundred and twenty acres, and so far as the proofs shows, was all the estate then owned by said Theodore, liable to execution.

The deed of trust recites that the consideration of the note was the amounts which said Theodore had received from the proceeds of sales of crops jointly raised by himself and his wife upon her lands, and by the labor of their slaves, from the time of their marriage, and the proceeds of sales of the separate property of said Hannah, received by him, and used in his own business, stating the amounts so received for each year, from 1856 to 1862, inclusive, being in all seven years, and making the amount above stated three thousand six hundred and sixty-seven dollars and seventy cents.

Mrs. Gillespie proved her claim as a secured debt with lien upon said lands, and filed this bill, praying that said deed of trust be set aside as fraudulent and void, and that said lands be sold, and the proceeds, so far as necessary, applied to the payment of said judgment. After the filing of this bill, Hamilton McKnight, who was solvent, and bound for the payment of said judgment, paid it in full to Mrs. Gillespie, and filed his petition, praying to be subrogated to the rights of Mrs. Gillespie in said judgment, and in the proceedings in this cause. The assignee in bankruptcy of said Theodore, also filed a petition, praying to be admitted as a party complainant upon the part of the general creditors of the said Theodore. The answer of Theodore and wife admits the judgment and the execution of the trust deed, but denies the fraud charged; also denies that Hamilton McKnight was the surety of Theodore; but states that they were joint makers, and that Hamilton McKnight was bound to pay one-half thereof. The proof, however, shows him only to be surety. The answer further charges that Hamilton McKnight is indebted to the estate of Theodore in a larger amount than the amount due on the judgment. Hamilton McKnight denies that he is indebted to Theodore in any sum, but

admits that they had been copartners in a mercantile establishment, and the accounts thereof remain unsettled between them. The suretyship of Hamilton McKnight being established, and he having paid the amount due to Mrs. Gillespie upon the judgment, his right to be subrogated to her rights in the judgment, and in this cause as a means of enforcing it, cannot be successfully questioned; but he can claim no greater rights than he would be entitled to were he the original complainant, and consequently must, before receiving the amount due upon the judgment, account for any balance that may be found due to the estate of Theodore McKnight, and to ascertain which, this question must be referred for an account.

The next and more important question is, was this accounting between Theodore and his wife, and the conveyance of the land to the trustee, fraudulent and void, as against the creditors of Theodore, existing at the time the same was made?

By the common law, the husband, upon the marriage, became vested with the title to the personal estate of the wife, as well as to that acquired during coverture, also the rents and profits of her real estate, consequently the support of the wife and family devolved entirely upon him. Such was the law in this State until the passage of the married woman's law in 1839, which secured to her, free from the debts and liabilities of the husband, her personal property, owned at the marriage, or which might come to her during coverture, provided it was not received from her husband, but left the rents and profits of her estate, real and personal, to the husband, as before, except the increase of her slaves, which went to the wife.

By the act of 1846, the wife's rights and liabilities were enlarged, so as to secure to her the rents of her lands and the products of the labor of her slaves; but rendering such income liable for supplies purchased for the use of her slaves or plantation. Thus the law stood until the adoption of the Code of 1857, upon that subject, and upon a proper construction of which the decision of the question now presented depends.

Article 1, Section 5, Chapter 40, page 336, secures to the wife the rents, issues, profits, and increase of her real and per-

sonal estate, and provides further, that if the husband shall purchase property with the money of the wife, and take the title in his own name, he shall hold it only as trustee for the wife; but with the limitation, that if the husband obtain credit in consequence of the possession of such property, such trust, as against such creditors, shall be void.

The next article renders her separate estate liable for contracts made by either herself or husband for the benefit of her separate estate, and also for supplies furnished for herself and her children, including household furniture, carriage, horses, etc., also for the education of the children. Thus throwing upon her a portion of the burden of her support and that of her children, the husband being thus deprived of the means for that purpose, given him by the common law.

The 28th Article, after making provision for the descent and distribution of the estates of married women, makes this proviso: "Provided, That neither the husband nor his representatives shall be liable to account to the wife or her representatives for the rents, profits, or income arising from the separate property of the wife, after the expiration of one year from the time of receiving the same."

Taking the different articles of this section together, it is evident that the income of the wife's estate, so far as necessary, should be used jointly with that of the husband in the support of the family; and further, that the wife should not, by permitting the husband to use and control the income of her estate as his own, obtain credit, and yet deprive the creditor of the means of payment upon which he had a right to rely.

The presumption, therefore, is, that if the wife permitted the husband to receive the income of her estate without accounting for the same for a longer period than one year from its reception, that it was used for the support of the family or that she was willing for him to enjoy the benefit of it in his business, without requiring him otherwise to account for it, and that the same should remain liable for his debt.

The rights of all parties must be governed by the laws in force when they accrue. Mrs. McKnight, by not calling her

husband to account for so long a period, lost her right to call him or his representatives, were he dead, to account for the income stated. The creditors, who either gave credit or indulgence, had a right to look to such income, or to the property of the husband acquired by its use, for the payment of their demands. The accounting for such income after the title had thus become vested in the husband, was a gift by the husband to the wife, and this, under the law as then in force, he could not do to the prejudice of his creditors, if indeed, it could be legally done at all, under the proviso: "Provided it is not received from the husband." To hold this conveyance valid as against the creditors of the husband, would be to give to the wife all the benefits of her estate, and relieve her from all the liabilities and burdens which the law imposed upon it; it would be to charge the entire expense of the support of the wife and her children to the husband, to be discharged at the expense of his creditors.

Admitting that the claim of the wife was valid, the amount of property conveyed, which was all that was subject to execution, so far as the proof shows, the length of time given for payment, the relationship between the parties, and all the circumstances, it would be difficult to come to any other conclusion than that it was a conveyance to hinder and delay other creditors, and to obtain an inequitable advantage over them.

The Act of 1867, entitled "An Act to amend the law heretofore in force respecting the rights of married women," has no application to this case, having been passed subsequent to the conveyance from Theodore McKnight to the trustee, and only applying to rights accruing after its passage. The limitation of one year made in code 1857 was not intended as a limitation of a suit brought by the wife against the husband, but as a limitation to the accounting itself.

This court is as much bound to respect and enforce the rights of married women under the laws of the State, as are the State courts, but neither can go beyond the legislative intention; especially when to do so would open the door to gross frauds by failing husbands upon the rights of their creditors.

After the able argument of counsel on both sides, and the most mature consideration of the important questions presented, I am compelled to hold this conveyance fraudulent and void as to the creditors of said Theodore McKnight, who were such at the date of its execution.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

1. That under the English law, the proceeding in bankruptcy did not interfere with the right of the landlord to distrain for rent, provided the property remained on the demised premises.
2. That under the Bankrupt Law of 1841, the right of the landlord to distrain, in those States where such right existed, was not lost.
3. *Held*, that the right of the landlord to distrain for rent may vary in different States under the Bankrupt Law, because the right of the landlord to distrain is not the same under the laws of all the States.
4. That under the statute of Illinois the distress-warrant is in the nature of an attachment upon *mesne* process, and the certificate given by the court after the case is heard in the nature of an execution.
5. That a fair construction of the Bankrupt Law upon the right of the landlord in our State is to vest in the assignee all the property of the bankrupt tenant upon which a distress-warrant has been issued and levied prior to the granting of the certificate of the court to the officer, of the amount due from the tenant and entered of record. But analogous to the rule in the case of final process, where the right of the landlord has been exercised by issuing and levy of the warrant of distress, filing the copy of the warrant and inventory of the goods before the proper court, and the obtaining the certificate of the amount found due, that becomes in the nature of a final process, where it is issued, and has a priority over the general creditors in bankruptcy.
6. That when no distress-warrant has been issued prior to the filing of the petition in bankruptcy, the landlord has no priority or preference over the general creditors, and must prove his debt like any other general creditor of the bankrupt.
7. Except in the particular cases referred to in the opinion, the landlord must be regarded as upon the same footing as the general creditors of the bankrupt, and can only have the right to come in like them, and prove his debt in the same way.

In re JOSLYN *et al.*

DRUMMOND, J.—Various affidavits and petitions have been filed in different cases in bankruptcy, concerning rent due by the bankrupts. They do not present in precisely the same form, nor in the same stages of progress, the acts of the landlord for the recovery of rent, so that, looking at them all together, it has become the duty of the court to decide in a gen-

eral way what is the effect of the Bankrupt Law upon the right of the landlord, in this State, to recover his rent, when due from a bankrupt to the landlord at the time the proceedings in bankruptcy are commenced.

It is necessary to consider, in the first place, what are the provisions of law in this State upon the subject of rent, and the right of distress in the landlord therefor.

The earlier acts did not, in express terms, authorize a distress for rent, but simply recognized the existence of a right in the landlord, it being, as is well known, a common law right; and the adjudications of our courts upon these earlier statutes proceeded upon that principle, but yet treated it as an absolute right. The law provided that where there was a distress for rent, it should be lawful for the landlord, by himself, his agent, or attorney, to seize for rent any personal property that might be found *in the county* where such tenant should reside, and in this respect it was different from the common law, which confined the right of the landlord to distrain for rent to property on the premises. The later statutes have in express terms authorized the landlord to distrain for rent in arrear, and, inasmuch as it was somewhat uncertain during what time the right of distress existed after the rent was due, the act of 1857 gave the right to the landlord to distrain the goods of the tenant for the period of six months after the expiration of the term for which the premises were demised. There are also some statutes which declare that the landlord shall have a lien upon certain products of the premises demised—for example, upon the crops growing or grown upon the premises.

There is, however, one provision of our statute which becomes very material in the view which the court takes of the questions now under consideration. It declares that in all cases of distress for rent, the person who makes such distress, where the claim is less than one hundred dollars, shall file with a Justice of the Peace; and where it exceeds one hundred dollars, with the clerk of the Circuit Court, a copy of the distress-warrant and an inventory of the property levied upon, and thereupon the party against whom the distress-warrant

shall have been issued, shall be *duly summoned*, and the amount due from him assessed and entered upon the records of the court finding the same, and then the court is to certify to the person or officer making the seizure the amount so found due, and thereupon the officer is to proceed to sell the property so distrained, and make the amount *thus certified to him, and return the certificate so issued to him, with an indorsement thereon of his proceedings, which return and certificate shall be filed in the proper court.*

Under this statute it has been held that the only province of the court is to ascertain whether there is the relation of landlord and tenant, and what is the amount due.

The question is, How does the Bankrupt Law affect the right or lien of the landlord to distrain for rent? In other words, has the landlord the right, under the law, to distrain for rent, notwithstanding the filing of the petition in bankruptcy, and can he, although there may be a distress-warrant out at the time of the filing of such petition, proceed to obtain a certificate from the proper court, and sell the property, notwithstanding a petition may have been filed in bankruptcy between the date of the levy of the distress-warrant and the time when the certificate to sell is granted by the court?

The only provision upon the subject of rent in the Bankrupt Law is contained in the 19th Section, which is: "Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof, up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods."

Under the English law, it is well known, the proceeding in bankruptcy did not interfere with the right of the landlord to distrain for rent, provided the property remained on the demised premises. Undoubtedly the right may vary in different States under the Bankrupt Law, because the right of the landlord is different in different States. In some, the right to distrain is entirely taken away, thus placing the landlord upon the same footing as other creditors, and giving him no priority.

In some the right to distrain still exists, as in our own State, modified more or less by statute.

Under the Bankrupt Law of 1841, the right of the landlord to distrain, in those States where such right existed, was not lost. Under the 2d Section of that law, "all liens valid by the laws of the States respectively, and not inconsistent with the provisions" of that law, were preserved; and in *Peck* v. *Jennes*, 7 Howard, 612, it was decided that an attachment, on *mesne* process, levied upon property, and valid by the law of the State where it was issued, was one of the liens preserved by the 2d Section of that law, notwithstanding the property might be held simply upon *mesne* process.

The 20th Section of the Bankrupt Law of 1867 declares that, "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt."

The question is, whether the lien of a landlord for rent is such a security as binds the property as against the assignee of the bankrupt, and against the rights of the other creditors.

To prevent some of the difficulties which sprung up under the law of 1841, the 14th Section of the Bankrupt Law of 1867 declares, that the assignment in bankruptcy shall relate back to the commencement of the proceedings (the filing of the petition), and by operation of law thereupon, the title to all such property and estate, both real and personal, shall vest in the assignee, notwithstanding the same is then attached on *mesne* process as the property of the debtor, and it shall dissolve any such attachment made within four months next preceding the commencement of the proceedings. Another clause of this same section declares, "that no mortgage of any vessel, or of any other goods or chattels, made as security for any debt or debts, in good faith, and for present considerations, and otherwise valid, and duly recorded, pursuant to any statute of the United States, or of any State, should be invalidated or affected. It is a little singular that while the Bankrupt Law

of 1867 makes this declaration as to the effect of *mesne* process, and of certain other securities upon property, it is silent as to the effect of the law upon final process; and the inference has been that while it cut off those attachments levied on property under *mesne* process, it did not necessarily interfere with the right of a particular creditor upon final process; and, therefore, where, under the law of a State, a *fieri facias* issued on a judgment was a lien on the property from the time of its delivery to the sheriff, such lien would be good, provided the judgment was obtained and execution issued in good faith, and not in fraud of the Bankrupt Law. The latest case, decided by the Supreme Court of Illinois, to which the attention of the court has been directed, is that of *O'Hara* v. *Jones*, reported in 46 Illinois Reports, 288. In that case the court refers to the decisions which had been previously made by that court, to the effect that under the law, the landlord had a lien, and a right to distrain in all cases where the rent was certain, whether the right was reserved in the lease or not. The point decided in that case was, that the landlord had a right to distrain for rent upon the property of the tenant, even after he had made a general assignment, for the benefit of creditors, of all his property, real and personal; on the ground that the assignee of the tenant could not hold the goods free from the lien of the landlord; that the assignee took the goods of the assignor as a volunteer, and subject to all the liens to which they were then liable. The court stated, in that case, that the lien in favor of the landlord was superior to other general liens, and might be enforced against all but prior liens and *bona fide* purchasers without notice, and adds: "And if the goods of the tenant are seized under execution or attachment, the landlord's lien for his rent is superior, and will hold the property."

Great stress has been laid upon this sentence, and it is claimed that under the construction which has been given to the law of the State by its Supreme Court, the assignee has no right to the goods of the tenant in bankruptcy, upon which the landlord has a lien. It may be conceded, that under the law of the

State, as construed by the Supreme Court, the lien of the landlord might be enforced against all but prior liens and *bona fide* purchasers; but, when it is said that the landlord's lien for rent is superior to that of a creditor holding the property under execution or attachment, such general language needs qualification in order to be regarded as strictly correct, and it must be understood as meaning that the landlord's lien would hold the property, provided it was not seized or held under a paramount lien; for if it is meant that the landlord would have a right to distrain goods held by virtue of an execution in the hands of the sheriff when the distress-warrant issued, then it certainly is not law, because that point was expressly ruled after full argument and great consideration by the court, in the case of *Rogers* v. *Dickey*, 1 Gilman, 636. There the distress-warrant was levied on the 1st day of May, 1842, on the property of a tenant found on the premises, for rent due on the 18th day of March previously; and the court held, that an execution delivered to the sheriff on the 8th day of March, against the tenant, bound the property, notwithstanding the levy was not made until the 26th day of May, after the distress-warrant was levied upon the property. In that case the court held, that the execution-creditor had a prior lien upon the property, because the execution was in the hands of the sheriff before the distress-warrant was levied.

It is claimed, and with *apparent* reason, that a distress for rent is not an attachment upon *mesne* process, and therefore is not within the meaning of the clause of the 14th Section already referred to; that it is an act of the landlord himself, enforcing his own lien, existing by operation of law, by issuing a distress-warrant, and causing the levy to be made upon the property.

It is true it is not, strictly speaking, an attachment upon *mesne* process; but the question is whether it is not in *the nature* of an attachment upon *mesne* process, and whether the order that is given by the court in the form of a certificate, after the case is heard, is not in the nature of an execution, and thus bringing the first case fairly within the general scope and spirit of the clause of the 14th Section. The language of the

State statute is, that after the property is levied upon the party shall be summoned. Now, the most that can be said about the effect of such a warrant is, that it seizes the property for the purpose of enforcing a certain right on the part of the landlord. The party against whom it is issued must be summoned to appear before a magistrate or before the court. Although this is not *mesne* process, it is in the nature of *mesne* process, requiring this proceeding in order to bring it under the sanction and action of the court. Without this the landlord can take no further step in the cause; and in this respect it is exceedingly similar to the case of an ordinary attachment upon regular *mesne* process, issuing out of a court.

It seems to me, looking at the whole scope and tenor of the Bankrupt Law, that when a case is in this way brought (as our law brings the distress-warrant of the landlord) within the spirit of the clause already referred to, it may be fairly said that the law operates in the case, and that the property is attached upon *mesne* process.

So when the party has been summoned and brought into court, and the court ascertains whether the relation of landlord and tenant exists, and what is the amount due for rent, and the amount due is entered upon the records of the court finding the same, and thereupon the court certifies to the person or the officer the amount so found due, together with the costs of court; this certificate given by the court is not, strictly speaking, final process, but it is in the nature of final process, and without it the officer cannot proceed to sell the property, and, therefore, the landlord cannot realize from the property attached the amount due for rent. When the certificate has once been issued, it is like a writ of *fieri facias* to the sheriff, directing him in effect to sell the property of the party. It is to be borne in mind that our law is not like the English law where there is interference between the right of the landlord, and that of the execution-creditor upon the goods of the tenant. The English law, as is well known, provided that where there was this conflict between the right of the landlord and that of the execution-creditor, that the officer making the levy under

the execution should pay the landlord one year's rent, and to that extent the landlord had a priority over the execution-creditor. We have no such law in force in our State, and, therefore, as has been already mentioned, the Supreme Court decided, in the case of *Rogers* v. *Dickey*, that the right of the execution-creditor was superior to that of the landlord under the circumstances stated.

On the whole, then, I am of the opinion that the fair construction of the Bankrupt Law upon the right of the landlord, in our State, is to vest in the assignee all the property of the bankrupt tenant upon which a distress-warrant has been issued and levied prior to the granting of the certificate of the court to the officer of the amount due from the tenant, and assessed, and entered of record. But that analogous to the rule in the case of final process, that where the right of the landlord has been exercised by the issuing and levy of the warrant, and filing a copy of that and of the inventory of the goods before the magistrate or in the proper court, and the obtaining of the certificate of the amount found due, that that becomes in the nature of final process where it is issued, and so has a priority over the general creditor in bankruptcy.

Of course it follows from what has been said, that where no distress-warrant has been issued, as is the fact in some of the cases upon which the judgment of the court has been asked, prior to the filing of the petition in bankruptcy, that the landlord can have no priority or preference over the general creditors, but that he must prove his debt like any other general creditor of the bankrupt, and consequently that all the property so held by the tenant is vested in the assignee.

The question is undoubtedly an important one, and will affect a very considerable amount of property. I have given it full consideration in view of the importance of the subject, and the effect it might have upon the rights of the landlord, and of the general creditors of the bankrupt. It is to be remembered, that in equity the landlord may have no just preference over many of the general creditors of the bankrupt, and in view of the general scope and spirit of the Bankrupt

Law itself, and of the effect which it was to have upon the rights of creditors, I have thought that unless the intention of the statute was clear, to allow the common law or statutory lien of the landlord to have a priority over the general creditor, it ought not to be so regarded; and, looking at the statutes in our State, bearing upon the right of the landlord to distrain for rent, it seems to me that fairly construing the two laws together, and the effect which one has upon the other, it must be said that under the Bankrupt Law, as operating upon the State law, the landlord, except in the particular case referred to, must be treated as being upon the same footing as the general creditors of the bankrupt, and can only have a right to come in like them, and prove his debt in the usual way.

UNITED STATES CIRCUIT COURT—S. D. NEW YORK.

One Clark commenced action in State court against his copartner for an accounting, and receivers were appointed, who took possession of the firm property. Pending such proceedings, the firm, with its members, was declared bankrupt upon petition of firm creditors. Clark petitioned to the United States Circuit Court for a review of the decree adjudicating him a bankrupt, and commenced successively two other actions in State court, and obtained injunctions restraining creditors from prosecuting proceedings in bankruptcy. Creditors thereupon moved the Circuit Court for a writ of prohibition, under the Judiciary Act of 1789, directed to the State court in the premises.

Held, the court can grant such writ only in cases where it is necessary for the exercise of its jurisdiction. Such jurisdiction in this case is revisory, and is not obstructed or interfered with by the actions prosecuted by Clark in the State court. Motion denied.

In re ABRAHAM BININGER *et al.* (*who are creditors of the said* BININGER AND ABRAHAM B. CLARK), *for a Writ of Prohibition.*

WOODRUFF, J.—The petition shows that upon the petition of creditors of Abraham Bininger and Abraham B. Clark, composing the firm of A. Bininger & Co, the latter have, by a decree of the District Court, been adjudged bankrupt, and that the said Clark is now prosecuting in this court, in pursuance of the 2d Section of the Bankrupt Law, a proceeding for the

review of that adjudication; that prior to the institution of the proceedings in bankruptcy in the District Court, the said Clark had filed his bill in the Superior Court of the City of New York, against his partner, Bininger, for an accounting and for the settlement of the affairs of the copartnership, the payment of the debts and the distribution of the assets, and therein a receiver had been appointed, who was, or claimed to be, in the possession of the property of the firm; that after the proceedings in bankruptcy were instituted, the said Clark commenced successively two actions in the said court, and procured from that tribunal injunctions restraining the petitioning creditors from prosecuting the said proceedings. The petition gives, with much detail, facts and circumstances tending to show that the purpose and effect of the prosecution of these several writs in the Superior Court, and motions therein to enforce obedience to said injunctions, is to defeat the operation of the adjudication of the District Court, and hinder or obstruct the administration of the property of the bankrupts by the District Court under the Bankrupt Law of the United States, and it is thereupon prayed, that this court will, pursuant to the 14th Section of the Act of Congress of the United States; passed September 4, 1789, entitled "An Act to establish the Judicial Courts of the United States," issue a writ of prohibition, addressed to the said Superior Court and the judges thereof, prohibiting the said court and the said judges from further entertaining the said actions, or from entertaining any other or further proceedings on the petition, application, or at the suit of the said Clark, for the purpose of interfering with the said adjudication and jurisdiction of the said District Court, or from interfering with or nullifying the effect of the jurisdiction of this court under the Act of Congress.

It is not suggested that this court has power to issue the writ prayed for unless the authority is conferred by, or is implied from some express statute; and both in the petition and in the brief submitted by the counsel for the petitioners such power is sought to be derived from the 14th Section of the Act of Congress of 1789, commonly known as "The Judiciary Act."

That section provides that all of the courts of the United States in the act before mentioned, including the Circuit Court, "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." (1 Stat., 81.) In *ex parte* Christy (3 Howard, 292) the Supreme Court of the United States, referring to this section, and to Section 13, which gives express power to that court to issue writs of prohibition to the District Courts when proceeding as Courts of Admiralty and Maritime Jurisdiction, by the opinion of Mr. Justice Story, disclaimed any general authority to issue a writ of prohibition to the District Court in cases in bankruptcy, over whose orders and decrees in such cases the Supreme Court possessed no revising power, however the District Court exceeded its jurisdiction. And the ground stated is, that the District Court, by such orders and decrees, did not interfere with, evade, or obstruct any appellate authority of the Supreme Court. Without, therefore, pausing to inquire whether, under the said 14th Section, this court has power, and if so, in what cases, to issue a writ of prohibition to a State court, it is clear, that if the power exist, the limitation is explicit which confines that power to cases wherein such writ is "necessary for the exercise of the jurisdiction of this court:" and since the power is not claimed to exist under any grant of general jurisdiction, or to have been conferred by any other statute, the test of the power to issue the writ now applied for lies in the inquiry whether, in the case made by the petition, such writ is necessary for the exercise of any jurisdiction now vested in the Circuit Court in the matter in litigation, and it is agreeable to the principles and usages of law. What, then, is the jurisdiction which this court has over the proceedings set forth in the petition? First. By a petition of review, Clark, the plaintiff in the actions in the Superior Court, has sought in this court a review of the decree of the District Court, wherein he is adjudged a bankrupt, and, for the purpose of that review, this court has acquired jurisdiction of those proceed-

ings. But the exercise of that jurisdiction is in no wise obstructed or interfered with by the actions prosecuted by him in the Superior Court. He may pursue that appeal to the revisory power of this court, and the respondents therein may here insist upon the correctness of the decree of the District Court, and this court will proceed to hear and reverse or affirm that decree, entirely unaffected by the pendency or the prosecution of those actions, and the action of this court in the matter of that review terminates with such affirmance or reversal. If such decree is affirmed, the decree of the District Court stands as the decree of that court and not of this, and to be carried into due execution by that and not this court. Second. The argument of the counsel for the petitioners involves the assumption that, by force of the 2d Section of the Act of Congress commonly called the Bankrupt Law, this court possesses, concurrently with the District Court, all the powers conferred by the 1st Section upon the last-named court, and, therefore, whatever impedes the execution of the decrees of the District Court, or obstructs or interferes with the administration of the estate of the bankrupts by that court, warrants the petitioners in insisting that the exercise of the jurisdiction of this court is obstructed or hindered, and in claiming in this court that the writ of prohibition is necessary. In the first place, this overlooks the familiar doctrine that, where the jurisdiction of the two courts is concurrent, the one which first obtains jurisdiction of the subject-matter and of the parties by the actual institution of proceedings therein, holds such jurisdiction exclusively of the other. But, in the next place, the Act of Congress does not so blend or confound the two courts in the administration of the Bankrupt Law. The courts are distinct under that act, as under all others, and exercise a separate jurisdiction, each in its own sphere. This is not supposed to be doubtful in respect to the appellate jurisdiction conferred on the Circuit Court by the 8th or 24th Sections of the act, to review, by appeal or writ of error, the proceeding of the District Court, nor in respect to actions at law or in equity, whereof the two courts are declared to have concurrent jurisdiction, as, for example, actions by or

against the assignee in bankruptcy, as provided in the 2d Section. Nor is it at all to be suggested that proceedings in bankruptcy can be initiated in this court. For that purpose the jurisdiction of the District Court is plainly exclusive. The provisions of the 2d Section relied upon are those which declare that "the several Circuit Courts within and for the districts where the proceedings in bankruptcy shall be pending shall have a general superintendence and jurisdiction of all cases and questions arising under this act, and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity." The claim that the prohibition prayed for in the petition herein is necessary to the exercise of the jurisdiction of this court, in the matter of the bankruptcy of Clark and Bininger, can only rest upon the ground that by force of the language above cited it is competent for the parties to come into this court and seek original orders and decrees in the due and ordinary course of such proceedings, either to facilitate the completion thereof, or to carry them into effect; that the proceedings having been duly instituted, the parties have an option to apply to either court to expedite or consummate the same; and, in short, that so soon as such proceedings have been begun they may be continued in either court, or partly in one and partly in the other. And yet, when this claim is thus broadly stated, no counsel will, I think, seriously insist that the section warrants so unprecedented and extraordinary a confusion of jurisdiction. Nevertheless, to insist that this court has jurisdiction in the proceedings themselves to make orders in specific execution or enforcement of the decrees or orders of the District Court, involves all that is above suggested. The superintendence and jurisdiction conferred in that clause of the 2d Section are revisory of cases and questions arising in the District Court, and contemplate a review of what is presented to that court for consideration and decision. They may include the power which in a special and perhaps more restricted form was given in the 6th Section of the Bankrupt Act of 1841, wherein authority was given to adjourn any point

or question arising in any case in bankruptcy into the Circuit Court, to be there heard and determined; and it may be that under the present act the presentation of such questions, and the jurisdiction of this court over them, does not, as in the former, depend upon the discretion of the District Court, as to which it is not necessary to express an opinion; but in either view, the questions, or cases presenting such questions, must arise in the District Court, and their determination in this court is either for the guidance or control of the District Court. This is not a jurisdiction to assume the conduct of the proceedings, or to specifically enforce or execute the orders or decrees of that court. For that purpose the District Court has ample and exclusive power. This jurisdiction, which is given for revisory, and, perhaps, advisory purposes to the Circuit Court, it can exercise notwithstanding the pendency and the prosecu tion of the actions mentioned in the petition herein. The ex ercise of that jurisdiction is not obstructed by anything shown by the petition. The jurisdiction of this court in the case in question, so far as shown by the petition for the writ of prohition, arises on a petition for a review of the adjudication, made in District Court, declaring Bininger & Clark bankrupts. There is no impediment to the exercise of that jurisdiction. The alleged proceedings in the State court in no wise interfere therewith. A prohibition of such action in the State court, as is set out in the petition, is not necessary for the exercise of any jurisdiction in the matter of the bankruptcy of Bininger & Clark, which the Circuit Court has acquired. This court can review, in the manner, and for all the purposes contemplated by the 2d Section of the act, the orders, decisions, and decrees already made, or which may be made in the District Court. Such review cannot be rendered inoperative or ineffectual by any action of the State court. It belongs to the District Court and not to this, to carry into execution its orders and decrees. If, therefore, it be assumed that a State court stands in such a relation to the Federal Court, that "agreeably to the principles and usages of law," a writ of prohibition could be issued by the latter to the former, the petition before us does not present a

case in which such writ is necessary to the exercise of our jurisdiction.

I have preferred to place the opinion upon the grounds above stated, not only because these questions of the construction of the 2d Section are of immediate practical importance, but also because they are directly involved in, and are decisive of, other motions pending before us in the same proceedings in bankruptcy mentioned in the petition.

The motion must be denied.

Mr. Bangs, for the motion.

Mr. Pryor, in opposition.

UNITED STATES CIRCUIT COURT—S. D. NEW YORK.

Petition of involuntary bankrupt was before the United States Circuit Court to review the decree of United States District Court adjudicating him a bankrupt, and assignee in bankruptcy filed petition for order to enjoin bankrupt from prosecuting certain actions in State court, and for other orders.

***Held*, motion denied for want of jurisdiction. The powers of the Circuit Court in bankruptcy cases are revisory only, and the proceedings for review bring only the decree and orders involved in it, before the Circuit Court, and do not operate to transfer to it the entire bankruptcy proceedings to be continued there as a court of first instance.**

In the matter of ABRAHAM B. CLARK AND ABRAHAM BININGER, *Bankrupts, on the Petition of* JOHN S. BEECHER, *Assignee in Bankruptcy of the Estate and Effects of the said Bankrupts.*

WOODRUFF, J.—The petitioner herein applies for an order directing the marshal to take possession of the joint estate and property of the above-mentioned bankrupts; an order restraining and enjoining the bankrupts and certain persons heretofore appointed receivers of the said joint property (in an action pending in one of the State courts between the said bankrupts for the settlement of their copartnership affairs), from any interference with the said property, "to the end that the said property may be brought within the jurisdiction of the District Court of the Southern District of New York, or within

the jurisdiction of this court. And that the District Court, or this court, may collect the assets of the said bankrupts, ascertain and liquidate liens, adjust priorities and conflicting interests, marshal and dispose of the funds so as to secure the rights of all parties, and make due distribution among all the creditors; and that, thereupon, the proceedings on this petition may be continued, by order of this court, in the said District Court, * * and that the said Clark may be restrained and enjoined from further prosecuting his said action against Bininger in the State court, and that he be directed to permit the petitioner (assignee in bankruptcy) to prosecute such action in the name of the said Clark, and by such attorney as the petitioner may employ, and for such other or further order or relief as may be proper."

The petitioner herein has wholly mistaken the nature and purpose of the general superintendence and jurisdiction conferred upon this court by the 2d Section of the Bankrupt Act. In the matter of the petition of Abraham Bininger and others for a writ of prohibition, submitted at the time the motion was made for the relief herein prayed for, that subject has been discussed and the conclusions of the court stated. That superintendence and jurisdiction is revisory in its nature and purpose, and was not intended to give to the parties an option to come to this tribunal for original orders in the nature of a specific execution of the decrees of the District Court. By the 1st Section of the act the District Courts are constituted Courts of Bankruptcy, and declared to have original jurisdiction in all matters and proceedings in bankruptcy, which jurisdiction, according to the very terms of the section, extends to and includes the collection of all the assets of the bankrupt, the ascertainment and liquidation of liens, the adjustment of priorities, and the other matters which the petition seeks to secure through the order of this court. And it is declared, that the said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the Circuit Courts now have in any suit pending therein in

equity. In giving a general superintendence and jurisdiction of all cases and questions arising under the act, Congress did not intend that the Circuit Court should assume the primary exercise of that summary jurisdiction thus conferred by the 1st Section on the District Courts. And yet that is precisely what is sought by the present petition. And the pendency here of the proceedings for the review of the decree by which Clark and Bininger have been adjudged bankrupts, has no bearing upon the present motion; those proceedings bring the decree and whatever orders are involved therein before this court, but do not operate to transfer the entire proceedings in bankruptcy into this tribunal to be here continued as in a court of first instance. The motion must be denied.

Mr. Bangs, for the motion.

Mr. Pryor and *Mr. Compton*, in opposition.

UNITED STATES CIRCUIT COURT—S. D. NEW YORK.

Bankrupt petitioned United States Circuit Court to review decree of the United States District Court, declaring him bankrupt, and commenced proceedings in State court to enjoin petitioning creditors, who thereupon moved the Circuit Court that he be ordered to elect whether he would further prosecute his petition to review, or his actions in State court, and unless he elected to discontinue and abandon the latter, that his petition to review be dismissed.

***Held*, the petitioner has a right to prosecute his petition to review if done in due form and without fault therein.**

Motion denied.

In the matter of ABRAHAM BININGER AND ABRAHAM B. CLARK, *Bankrupts.* JOHN S. BEECHER *v.* ABRAHAM BININGER *et al.*

WOODRUFF, J.—In deciding the various motions which have been presented to the court in the above proceedings, the facts alleged and the claims of the parties have been more than once recited. For the understanding of the present motion it will suffice to say, that Abraham B. Clark has brought his petition of review to this court, alleging that the decree of the

District Court adjudging him and his copartner, Bininger, bankrupts is erroneous, and ought to be reversed. He has also commenced actions against the petitioning creditors in the Superior Court of the City of New York, complaining of the conduct of those creditors in petitioning for such decree, alleging that the decree is erroneous in law and in fact, and that it was sought through improper motives and by collusion with his late partner, and has obtained a temporary injunction to restrain their prosecuting their proceedings. The petitioning creditors now move that this court, by its order, require him to elect whether he will further prosecute his petition of review in this court, or those actions in the State court, and that unless he elect to abandon and discontinue the latter, his said petition of review be dismissed. The section which gives to this court superintendence and jurisdiction in all cases arising under the Bankrupt Act, and declares that the court may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case, does not, it is true, declare in terms that the party aggrieved, or any party, shall have the right to invoke that superintendence and jurisdiction, but that is necessarily implied. A court of justice is not at liberty to disown its jurisdiction, or to refuse to entertain parties who apply in due form for its exercise. Where the jurisdiction is itself discretionary it may be declined, and where parties do not apply in the legal or prescribed manner, or in due season, or are otherwise in fault in the matter of the review sought, doubtless the court may dismiss their application, and the control of the court over frivolous and vexatious appeals of any kind is not questionable. But I find no warrant for the suggestion that the court can, with propriety, impose compulsory dismissal as a penalty or consequence of alleged or supposed misconduct elsewhere, which has no effect to delay or impede the exercise of the power of the court in the matter of the relief sought. If the party who brings his appeal or petition of review to this court were, by act of the appellant or petitioner, through the aid of a State court or otherwise, hindered or delayed in the bringing of the same to

a hearing, or in making other disposition thereof, a different question would arise, and the court could require such appeal or review to be brought to a hearing in due season, or that the same be dismissed.

It would not be respectful to the State tribunal to assume that the decree or judgment of the District Court, or of this court, would not there be regarded as conclusive for all the purposes for which it is conclusive here. That, however, is not to be discussed on this motion. If the petitioner prosecutes his review in due form, and be without fault therein, we deem it proper to hear it. We must, therefore, decline to require the petitioner to make the election sought on pain of a dismissal of his proceedings.

Mr. Bangs, for the motion.

Mr. Compton, in opposition.

UNITED STATES DISTRICT COURT—S. D. NEW YORK

A firm whose assets largely exceeded its liabilities, dissolved, and one of the members, C., brought action in State Court against the other, B., to have an accounting, and receivers appointed for the firm property. State court ordered the appointment of receivers, who took possession thereof. Pending this action C. and B. were adjudged bankrupt on petition of a creditor, an assignee was appointed, and an order issued for marshal to take the property. The receiver resisted. On application of the assignee for order,

Held, rights and rights of action of a bankrupt, in suits and actions pending in State courts, pass and vest in the assignee in bankruptcy. The bankrupt C. ordered to execute proper instruments to enable the assignee to represent him in his action in the State court, and enjoined further proceedings in respect thereof without leave of the Bankruptcy Court.

Decision in respect of the rights of the assignee against the receivers suspended.

In re ABRAHAM B. CLARK AND ABRAHAM BININGER.

BLATCHFORD, J.—On the 19th of November, 1869, an action was commenced in the Superior Court of the City of New York, by the bankrupt Clark against the bankrupt Bininger. The complaint in that action, the truth of which was deposed to by the plaintiff therein, set forth that a copartnership which

had existed between the parties to the action since the 1st of June, 1861, in the business of the importation and sale of liquors, etc., was dissolved on the 19th of November, 1869; that the said parties then owned certain real estate and a large and valuable stock of goods, and had a large amount of debts due them, and a valuable good-will; that the copartnership suspended payment on the 4th of November, 1869, owing to sundry specified wrongful acts of the defendant; that its assets amounted to five hundred thousand dollars, or thereabouts, and its entire indebtedness did not exceed the sum of two hundred thousand dollars; that the defendant had since such suspension, usurped the entire control and management of the business, to the exclusion of the plaintiff, and with a view to deprive him of his rights in the copartnership; that if the management and settlement of the business should be left to the defendant the rights and interest of the plaintiff and of the creditors of the copartnership would be greatly jeoparded if not sacrificed; and that, on a final accounting between the parties to the action, a large sum would be found to be due to the plaintiff, after paying all just debts of the copartnership over and above all advances or otherwise, made by the defendant to the plaintiff or to the copartnership. The complaint demanded judgment, that the copartnership should be dissolved; that a receiver of the property, rights, and good-will of the copartnership should be appointed, with power to dispose of the same for the benefit of all parties entitled thereto; that the proceeds thereof, after the payment of all just debts of the copartnership, and of the costs of the action, should be divided between the parties to the action, according to their respective rights; and that the defendant should be enjoined and restrained from interfering with the property, rights, and goodwill of the copartnership. On the 19th of November, 1869, an order was made in said action appointing a receiver of the property and effects of said copartnership, who, on the same day, took possession as such receiver, of certain goods, wares, and merchandise, real estate and other property of the said copartnership. Subsequently a co-receiver was appointed in the

action, who entered into possession as such with the original receiver of the said property.

On the 11th of December, 1869, a petition in involuntary bankruptcy was filed in this court against Clark and Bininger, under which they were adjudged bankrupts. An assignee has been appointed, and the usual assignment has been made to him, and a warrant of seizure, according to Form No. 59, has been issued to the marshal. The assignee now presents a petition to this court, setting forth that the said original receiver resisted the marshal in his endeavors to take possession of the copartnership estate of the bankrupts; that the marshal has never become exclusively possessed of said estate; that most of the joint creditors of the bankrupts have proved their debts in these proceedings; and that the said assignee has notified the receivers of his appointment, and has requested them to deliver to him the said property in their possession. The petition claims that the right, title, and interest of the bankrupts in the property which was the subject of controversy in the State court has ceased, by means of the proceedings aforesaid, and has become vested in the assignee; that all the interests, claims, and remedies of creditors of the bankrupts against the said property have also ceased, and have become vested in the assignee, and that the only remedy and resort of the bankrupts, or of their creditors, against the said property, is in this court.

The prayer of the petition is, 1st. That this court will order the marshal to take from the possession of the receivers the joint estate and property of the bankrupts now or heretofore in the possession of the receivers; 2d. That this court will enjoin the receivers and the bankrupts from any further interfering with the said property, to the end that it may be brought within the jurisdiction of this court, so that this court may collect all the assets of the bankrupts, and ascertain and liquidate the liens and other specific claims thereon, and adjust the various priorities and conflicting interests of the parties, and marshal and dispose of the different funds and assets, so as to secure the rights of all parties, and due distribution of the assets among all the creditors, and that thereupon the proceedings on

the petition may be further continued in this court, in order that any lien and claim of the receivers upon the property may be determined and provided for; 3d. That the bankrupt Clark may be restrained and enjoined from further prosecuting his said action against the bankrupt Bininger, or applying for any order or decree therein without the leave of this court; 4th. That such further, or other, or different rule or order may be made as may be proper in the premises.

The receivers appear and resist the granting of the prayer of the petition, so far as it affects them. They claim that their appointment was legal and valid, that their duty requires them to hold and safely keep the said property, and that they have a lien upon the said property for their lawful fees and disbursements therein incurred. Clark also appears in opposition to the application.

It is apparent from the frame of the complaint in the suit in the State court, that the reason for bringing it was that a large sum would, on a final accounting between Clark and Bininger, be found due to Clark after paying the debts of the copartnership, over and above all advances or otherwise made by Bininger to Clark, or to the copartnership, and that the conduct of Bininger had been such towards Clark, and in the management of the business of the copartnership before and after its suspension, that if the management and settlement of such business were to be left to Bininger, the rights and interests of Clark and of the creditors of the copartnership, would be put in peril. Hence the prayer for a receiver, for a judicial winding up of the affairs of the copartnership, and for an injunction against Bininger. On the facts stated, and with a net surplus of assets amounting to three hundred thousand dollars after paying the debts of the copartnership, it is apparent that a large additional property would remain to go to Clark. By virtue of the 14th and 36th Sections of the Bankruptcy Act, this individual property of Clark's passed to the assignee in bankruptcy, to be applied, if necessary, to the payment of his separate debts. By the 14th Section it is specially provided that all rights in equity of the bankrupt, and all his rights of action for property or

estate, real or personal, and for any cause of action which he had against any person, arising from contract, with the like right, title, power, and authority to sue for and recover the same as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee. Under this provision all the rights and rights of action which Clark is seeking to enforce in the suit brought by him have passed out of Clark, and are vested in the assignee in bankruptcy. The 14th Section also provides that the assignee may sue for and recover such estate, and may prosecute and defend all suits at law or in equity pending at the time of the adjudication of bankruptcy, in which the bankrupt is a party, in his own name, in the same manner and with the like effect as they might have been prosecuted or defended by such bankrupt. The 16th Section provides that if, at the time of the commencement of proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. These provisions of the 14th and 16th Sections include suits and actions pending in the State courts, and are addressed to the courts in which such suits or actions are pending, quite as much as to the Federal courts. The 26th Section provides that the bankrupt shall, at all times, until his discharge, be subject to the order of the Bankruptcy Court, and shall, at the expense of the estate, execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated, and that, for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for contempt of court.

As all the rights of action which Clark is seeking to enforce in the suit pending in the State court are now vested in the

assignee in bankruptcy, it is proper that such assignee should be allowed to prosecute such action in his own name, and that this court should require Clark to execute all such writings and do all such acts as will enable such assignee so to prosecute such action. To that end an order will be entered that Clark execute and deliver to the assignee the proper papers to enable the assignee to be admitted to prosecute such action in his own name, in the same manner and with the like effect as it might have been prosecuted by Clark, and that Clark himself refrain from prosecuting said action or applying for any order or decree therein without the leave of this court. The bankrupt must be enjoined from interfering with the property of which the receivers have possession.

This relief, of turning over to the assignee the prosecution of the action brought by Clark in the State court, though not specially prayed for in the petition, was asked for by the assignee on the hearing, on the petition under the prayer for general relief, and as a corollary to the prayer for an injunction restraining Clark from further prosecuting such action. As it is quite probable that, if the assignee be substituted as plaintiff in the action, it may be desirable that the possession of the receivers should not be disturbed until such substitution shall take place, a decision on the other matters involved in the prayer of the petition is suspended for the present.

F. N. Bangs, for the assignee.

R. A. Pryor and *J. F. Morgan*, for the receivers.

M. Compton, for Clark.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

No discharge will be granted where the bankrupts, merchants, have failed to keep cash-book. Specification that bankrupts had not kept proper books of account, in that they did not show what moneys were received or disbursed, is sufficiently specific to admit evidence that no cash-book whatever was kept for a period of time.

In re GARRET S. BELLIS AND JAMES MILLIGAN.

BLATCHFORD, J.—The discharge of the bankrupts is opposed

on the ground, as stated in one of the specifications, that, since the passing of the Bankruptcy Act, the bankrupts, being merchants or tradesmen, have not kept proper books of account in their business, as required by the said act; in that the true or real condition of their affairs and business cannot be ascertained therefrom; and in that such books do not show what moneys, merchandise, and property they purchased or received, or what disposition was made of the same; and in that transactions both of moneys received and property sold, amounting to many thousand dollars, are not entered therein; in other respects the books are not proper books of account, considering the business and condition of the debtors, or such as would enable a competent person to determine therefrom the real condition of their affairs.

The bankrupts were merchants engaged in business as copartners from some time in 1866 until June, 1868. The evidence is clear that they kept no cash-book, or account answering the place of a cash-book, between the 2d of March, 1867, and the 2d of January, 1868, and that it is impossible for a competent book-keeper or accountant to ascertain, from the books which they kept, what was their financial condition when they suspended business on the 15th of June, 1868. The keeping of a cash-book by merchants such as the bankrupts were, is indispensable. (*In re* Solomon, 2 N. B. R., 285; *in re* Gay, 2 N. B. R., 358; *in re* Littlefield, 3 *Id.*, 57.)

The specification averring, as it does, that the bankrupts have not kept proper books of account in their business, in that such books do not show what moneys were received, or what disposition was made of the same, is sufficiently specific to admit evidence that no cash-book whatever was kept for a period of time. (*In re* Littlefield, 3 N. B. R., 57.) Besides, if necessary, an amendment of the specification would, under the circumstances, be allowed.

A discharge is refused.

J. N. Piper, for the creditors.

Abbett & Fuller, for the bankrupts.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

1. *Held*, where a firm was insolvent, and at the time of giving a warrant of attorney authorizing a confession of judgment, had reason to believe that they could not pay their debts in the ordinary course of business, that the giving of a note and power of attorney to confess a judgment operated as a preference.
2. That it is to no purpose that a man says, when he is insolvent and signs a note and warrant of attorney and gives it to his creditor, the effect of which is to enable that creditor to enter up judgment and levy on his property, that he did not intend to give a preference.
3. That when a person suspects the solvency of his debtor, and in consequence of that suspicion obtains property or money, and thereby a preference, and it turns out in fact that his debtor is insolvent, that he may be said to be in the predicament contemplated by the Bankrupt Law, he has reasonable ground to believe that his debtor is insolvent, and cannot avail himself of a judgment or security so obtained.
4. That where a man acts without knowledge of the condition of the party or of anything to create suspicion of his solvency, and obtains a judgment or security, then the Bankrupt Law will not interfere with it.
5. The words "suffer his property to be taken on legal process," as used in the 39th Section of the Bankrupt Law, construed.
6. In this case the damages were assessed at what the property brought at the sheriff's sale, with interest thereon.

In Chancery.

GEORGE W. CAMPBELL, *Assignee of* HITCHCOCK & ENDICOTT, *Bankrupts*, *v.* THE TRADERS' NATIONAL BANK OF CHICAGO, AND HOTCHKISS & SONS.

DRUMMOND, J.—This case has been very fully and ably argued by the counsel on both sides, and the questions involved are not entirely free from difficulty.

The controversy grows out of the business transactions of Hitchcock & Endicott, of Chicago, commencing in the fall of 1866, and terminating about the latter part of May, 1867.

In the fall of 1866 this firm commenced doing their banking business with the Traders' Bank, of this city; making deposits, drawing checks, borrowing money, etc.,—all the usual business which such a firm as Hitchcock & Endicott would have with banks. In the spring of 1867 there would seem to have been some trouble in the affairs of Hitchcock & Endicott, as early as the beginning of March. At any rate, on the 5th of March, 1867, a note and warrant of attorney authorizing a confession

of judgment was given by them to Hotchkiss & Sons, defendants in this case, for a debt of over one thousand three hundred dollars.

The principal transactions which are the subject of inquiry here occurred during the month of May, 1867. At that time the president of the Traders' Bank thought it material to inquire into the standing and pecuniary position and resources of Hitchcock & Endicott, it would seem, partly to satisfy himself as the president of the bank, and partly with a view of properly answering inquiries that were made as to their condition. About the 10th or 12th of May, in reply to a request made by the president of the bank to Hitchcock & Endicott, a statement was furnished purporting to set forth the condition of the house—their assets, resources, and liabilities—which showed a balance in their favor of something over twelve thousand dollars. This statement seems to have been, to some extent at least, satisfactory to the president of the bank, and the business went on in the usual way.

During this time there had been very considerable loans made by the bank to Hitchcock & Endicott, and on the 28th of May that loan altogether amounted to several thousand dollars. On the 24th of May, however, the president of the bank had received some information which induced him to believe that the statement which had been previously furnished was untrue. It appears that the bookkeeper of the firm had run away. Before going he had written a letter to Mr. Hitchcock saying that in the statement already referred to, showing the assets and liabilities of the firm, there had been a mistake made of ten thousand dollars; that is to say, that their liabilities were ten thousand dollars more than they were represented to be. Upon learning this fact, the president of the bank, as he says, became somewhat alarmed as to the condition of the account between the bank and Hitchcock & Endicott, as well as indignant that a false statement had been presented to him with a view of deceiving him. Thereupon he took immediate measures to secure the indebtedness due from Hitchcock & Endicott to the bank. It is to be observed that during all this time, as

the proof clearly shows, the house of Hitchcock & Endicott was in trouble—in embarrassed circumstances. It did not meet its paper as it fell due; renewals were made from time to time, and when notes and bills would become due to the Traders' Bank, instead of being paid, a new transaction, as the president calls it, was made, by which the loan was extended; in other words, the old note or bill was taken up and a new one given.

So that, in his opinion, in order to obtain the debt due from Hitchcock & Endicott to the bank, strong measures were necessary. Mr. Endicott, it is to be remarked, was absent from the city at that time, and until immediately before the matter was finally closed. Mr. Hitchcock was present, and most of the negotiations and conversations took place between him and the president of the bank. On the 28th of May, a suit was commenced by the Traders' Bank against Hitchcock & Endicott, and an affidavit was made for a *capias* against Hitchcock on the ground of the fraudulent statement, as alleged, that had been made as to the condition of the firm. A summons issued against Endicott, and a *capias* against Hitchcock. As the result of this proceeding, on the 28th of May, in the evening, and under the threat of an arrest of Hitchcock by the sheriff, he and Endicott, the latter being induced to do so, as he says, in consequence of his belief that he was implicated with Hitchcock, consolidated all the indebtedness then due to the bank in a note, payable on demand, which they signed, and with which they gave a warrant of attorney to confess judgment thereon, and a judgment was accordingly entered on the next day, May 29, 1867, against Hitchcock & Endicott, and execution issued and property was levied on.

On the 30th of May, Hotchkiss & Sons filed their warrant of attorney, and took judgment against Hitchcock & Endicott, and issued execution. The property of Hitchcock & Endicott was sold by the sheriff under these executions, and the proceeds are in the hands of the Traders' Bank.

It is to be observed that this occurred a few days before the Bankrupt Law went into effect, as to the filing of petitions: The *proviso* at the end of the law being, "that no petition or other

proceeding under this act shall be filed, received, or commenced before the first day of June, A. D. 1867."

Subsequently, during the month of June, Hitchcock & Endicott filed a petition in bankruptcy, and some of their creditors also filed a petition against them. The former was abandoned, and the case proceeded under the involuntary petition. An injunction was issued from the District Court to prevent the sale of the property, but a sale, as has been already stated, was made by the sheriff. No application has ever been made to the court upon the subject, and I suppose it was understood that the controversy was to be settled by a bill in chancery.

This bill has been filed by the assignee of Hitchcock & Endicott to reach the goods of the firm or their proceeds, and the case comes up now under this brief statement of facts.

There are several questions which arise, and which it becomes necessary to decide.

The first is, whether, in executing the warrants of attorney authorizing the judgments to be taken against them, Hitchcock & Endicott violated any provision of the Bankrupt Law.

Secondly—Whether, if so, the Traders' Bank was affected by the action of Hitchcock & Endicott in such a way as to prevent it from availing itself of the money or property thus obtained.

As a part of these, are several minor questions.

First. Were Hitchcock & Endicott insolvent at the time that they executed the note and gave the warrants of attorney to confess judgment?

I have no doubt that they were, in fact, insolvent on the 28th of May, 1867. Their liabilities were between thirty and forty thousand dollars, and the difference between the assets and liabilities was such at the time that no candid, intelligent business man could fail, I think, to reach the conclusion that they had not enough to pay their debts. There is no doubt *now* of the fact that they were insolvent. It has not been seriously controverted in the argument. What has been claimed is that Hitchcock & Endicott did not *believe* they were insolv-

ent, but thought that they would be able to continue their business and pay their debts.

Without dwelling longer upon the proof in favor of the conclusion that they were actually insolvent, we will proceed now to another question, namely—Whether they, as reasonable and intelligent men, had a right to believe that they were insolvent?

They say that they thought that they would be able to pay their debts. But why did they so think? They had been struggling to pay their debts for months, and had not done it. Bill after bill, and note after note, had matured, and they had not been paid. They had given, early in March, a warrant of attorney authorizing a confession of judgment. They had been before sued; were on the 28th of May specially pressed by the Traders' Bank for payment or security of an indebtedness of more than six thousand dollars which they could not meet. Their bookkeeper had absconded, writing word that he had made a mistake of ten thousand dollars in the statement of their condition. As reasonable and intelligent men, what right had they to suppose or believe that they were in a solvent condition? Especially if they complied with the peremptory and threatening demand of the president of the Traders' Bank, and gave a warrant authorizing a confession of judgment with the power to proceed against them at once, upon what ground could they suppose that they would be able to pay their debts? I cannot see, looking at the case as it is presented under the evidence, that there was any intelligent reason existing from which they could infer that they could pay their debts; I mean, in the ordinary course of business. Undoubtedly it was possible that some unusual, unforeseen event, might occur to enable them to do it, but in the regular course of business, judging by what had taken place for several months past, extrication would seem well nigh impossible. Therefore, looking at their position with that degree of intelligence which every business man is supposed to bring to bear upon the state of his finances in such an emergency, the best that could be said was that they were financially in an extremely critical condition. Certainly the

president of the Traders' Bank so thought, if we are to judge by his actions.

They were, then, insolvent. The proof before them of their condition was sufficient to justify any intelligent person in the conclusion that they were so insolvent, and in this state of affairs they were called upon, under the threat of an arrest from their principal creditor, to sign a note and give a warrant of attorney to confess judgment.

Now, what was the motive with which this was done? If they were insolvent, as a matter of fact, and they were called upon in this way to give a note and warrant, with what object was it done? They say it was not to give a preference to the Traders' Bank. The president of the Traders' Bank also says that it was not done for that purpose. But for what other purpose could it be done than to give a preference? It follows as a legal conclusion, I think, from the state of facts then existing, and which facts were known to Hitchcock & Endicott, and from which they must be presumed to draw reasonable and intelligent conclusions, that the giving of this note and warrant of attorney did, in point of fact, operate as a preference.

There is only one possible contingency from which that result could be avoided, namely, that they signed the note and warrant of attorney under the belief that it would not be used as a security against them, and it is not pretended that there was anything of that kind attempted, or any hope to that effect held out to them. Mr. Endicott, it is true, says that he signed the note under the declaration of the counsel of the bank—when interrogated as to what would be done with the note and warrant of attorney if signed—that upon that point he had no instructions from the bank. Certainly no intelligent person could infer from such a statement that the warrant of attorney might not be used immediately, and that instructions might not come as soon as the warrant of attorney was signed, as in fact they did.

They were, then, insolvent, and they must have signed the note and the warrant of attorney to give a preference to the

Traders' Bank. That was, as I have said, the legal effect of the facts and of what they did. It is to no purpose that a man says, when he is insolvent and signs a note and warrant of attorney, and gives it to his creditor, the effect of which is to enable that creditor to enter up judgment, and issue execution, and levy on his property, that he did not intend to give a preference. Actions, in this, as in so many other cases, speak louder than words; and the conclusion necessarily follows, from such a state of facts, that he does intend to do what is the necessary consequence of what he does, or, according to the oft-repeated statement of the books, a man is supposed to know what is the necessary consequence of his own acts.

Then, the next question is—Had the president of the bank reasonable ground to believe that Hitchcock & Endicott were insolvent? I think he had.

The language of the 35th and 39th Sections of the Bankrupt Law is substantially that, when there is a payment, sale, assignment, transfer, or other conveyance made, or a warrant of attorney to confess judgment given by a person who is insolvent, with the intent of creating a preference, and the party to whom it is so given, has reasonable ground to believe it, the act by which that preference is sought to be accomplished shall become nugatory, and whatever money or property has been acquired thereby can be recovered back by the assignee in bankruptcy.

I do not suppose that the president of the bank was guilty of, or intended to commit, any fraud in fact. His bank had loaned Hitchcock & Endicott a very considerable sum of money; he had become alarmed as to their condition, and desired to put an end to all business transactions between the bank and them, and naturally wished to obtain his debt or security for it as soon as practicable.

But—to recapitulate briefly—his attention had been some time before directed to their pecuniary condition. It had become the subject of inquiry. A mistake had been discovered in the statement made to him, which rendered the margin in

their favor so small as in his opinion to justify the greatest anxiety as to the safety of the account. In fine, his whole conduct evinced alarm, and a suspicion that Hitchcock & Endicott would not be able to pay their debts. And I take it to be a sound rule, that when a person suspects the solvency of his debtor, and in consequence of that suspicion obtains property or money, and thereby a preference, and it turns out in fact that his debtor is insolvent, that he may be said to be in the predicament contemplated by the Bankrupt Law; he has reasonable ground to believe that his debtor is insolvent, and so cannot avail himself of the payment made or the security obtained.

The 39th Section of the Bankrupt Law declares that if any insolvent person shall give any warrant to confess judgment, or procure or suffer his property to be taken on legal process, with intent to give a preference, he shall be deemed to have committed an act of bankruptcy.

There remains, then, the question whether Hitchcock & Endicott, within the meaning of this law, *suffered* their property to be taken on a legal process?

It has been insisted that they were not within these terms of the Bankrupt Law. I admit that it must be an act of volition on their part; it must be, in other words, something that is done voluntarily. The mind must act freely, not under duress; and the question is, whether Hitchcock & Endicott did, in this case, within the meaning of this law, suffer their property to be taken on legal process. I think they did.

It is true that there was a moral force brought to bear upon them to induce them to sign the note and give the warrant of attorney; but they did it, as they say, because they did not wish to bear the indignity and the injurious effects which might flow from the arrest of one member of the firm. But it was not the less a voluntary act on their part. They, as free agents, signed the note and warrant of attorney. The motives that were brought to bear upon them may have been of more or less stringency, but it was not done under duress. Indeed, the threat of arrest was made upon an ordinary *capias* in a civil

suit, and it does not even appear that the arrest could have been sustained.

Then, being voluntary, did they intend to suffer their property to be taken on legal process? If they did not intend this, what did they intend? For what did they give the note and sign the warrant of attorney? What possible object could the president of the Traders' Bank have had in demanding the execution of these instruments, except to take the property of Hitchcock & Endicott on legal process?

As rational and intelligent men, what other inference could they draw from what had taken place? And looking at the matter under the operation of these causes, what other conclusion can follow than that they intended to suffer their property to be taken on legal process?

I entirely agree with those courts which declare that the word "suffer" is different from the word "procure." "Suffer" implies a passive condition, so to speak—as to allow or permit—not a demonstrative, active course like the word procure. It is the very definition, I think, to apply to the case of pressure and powerful motives brought to bear upon a party. Under the influence of this pressure and the operation of these motives, he *suffers* a thing to be done—that is, allows or permits it—and the law intended to prevent this.

Again, it is impossible to lose sight of the time during which these matters were transacted—the 28th and 29th of May, 1867. The Bankrupt Law went into operation on the 1st of June, a few days afterwards—so far as to allow the filing of petitions. The president of the Traders' Bank acted under the influence, as he admits, of the Bankrupt Law, and of certain views and opinions which he had in relation to it. What was to be done had to be done quickly, or on the 1st of June these parties, or any one of their creditors, could file a petition in bankruptcy, and then there was no chance of any preference. So that the inference, I think, derivable from the peculiar juncture at which the transactions took place, is unfavorable to the Traders' Bank, as well as to Hitchcock & Endicott.

The great principle of the Bankrupt Law—the distribution

equally among all the creditors of the property of a man unable to pay his debts—is, I think, attacked in this case by the attempt by which the Traders' Bank sought to obtain a preference. It was natural, perhaps, that the president of the Traders' Bank should seek the payment of the debt; most men, possibly, would have done the same; but it is not the less true, in my judgment, that such a course of action does interfere with the operation of the Bankrupt Law, and prevents the equal distribution of the assets of this firm to their creditors.

It has been said, and will be said again, that we ought not to prevent or interfere with the ordinary business operations between man and man. That is true, and we do not attempt to do it unless there is something in the transaction indicating that the man who makes it has reason to believe that he is getting what ought to belong to the creditors generally, and if so the Bankrupt Law declares that he cannot avail himself of money or property thus obtained. But where a man acts without knowledge of the condition of the party or of anything to create suspicion of his solvency, and in good faith obtains a payment or security, then the Bankrupt Law will not interfere with it.

I have considered exclusively the relations of Hitchcock & Endicott with the Traders' Bank. The bill will be dismissed as to Hotchkiss & Sons. They are not in court. The facts applicable to that case are somewhat different from those existing in the case of the Traders' Bank. Their warrant of attorney was given on the 5th of March. The condition of Hitchcock & Endicott had not been so completely developed at that time as it was on the 28th and 29th of May. The sheriff is not a party and is not in court. It is possible that Hotchkiss & Sons might be compelled to abide the consequences of the action of the court if the sheriff was in court, on the ground that he represented them, but it is not necessary to decide this point.

As to the Traders' Bank, they have obtained the benefit of an unwarrantable preference; the property has been sold and the money paid over to them—possibly sold at a sacrifice; the proof

as to what it was actually worth, perhaps, is not very satisfactory; and although, in many cases, what property may bring at a forced sale is not the true criterion of its value, I feel inclined to take that view of the case in this instance, and to hold that the Traders' Bank is responsible for nothing more than the proceeds of the sale. The property was sold under two executions, that of the Traders' Bank and Hotchkiss & Sons, and the proceeds were more than the execution of the Traders' Bank. There was, besides, a payment of over three hundred dollars made on the debt, of money in the hands of the Traders' Bank on the 29th of May, and for which a check was given, and there was nine hundred dollars of money which was levied upon in the hands of the Traders' Bank by the sheriff at its instance. I think that these incidents will have to follow the principal; that the result of the reasoning which has been stated leads necessarily to the conclusion that the same consequences flow from the payment and levy of these sums, and therefore that they would be included as a part of the amount of damages for which the Traders' Bank would be responsible, and I think the Traders' Bank will be liable, also, for the interest from the time of the receipt of the money. As some incidental questions may arise, perhaps it is better the case shall be referred to a master.

And it was referred accordingly.

UNITED STATES DISTRICT COURT—GEORGIA.

Creditor had judgment in Georgia against bankrupt in 1858, and sought to prove his claim in bankruptcy.

Held, he was entitled to no priority on account thereof, no entry having been made in the execution for seven consecutive years subsequent to Oct. 4, 1860, and he had no lien by the laws of Georgia. The Bankrupt Law recognizes as liens only those that are valid and binding in the State where the property is situated.

In re WILLIAM R. COZART.

I, FRANK S. HESSELTINE, Register of said Court in Bankruptcy, do hereby certify that in the course of the proceedings

in said cause the following question pertinent to the same arose, and was stated by Lyon de Graffenreid and Irwin, counsel for S. F. Lassiter, a creditor of the said bankrupt:

S. F. Lassiter proved a claim against the bankrupt on a judgment obtained in the Superior Court of Lee County, Georgia, at the March term, 1858. I decided that the said judgment was, by the code of Georgia, dormant, there being no entry upon the execution for seven consecutive years subsequent to the 4th day of October, 1860. Lassiter, by his counsel, excepted to this decision, and requested that the issue should be certified to your honor for your opinion thereon.

OPINION OF THE REGISTER.

The grounds upon which the counsel of Lassiter claim that the said judgment is valid and binding, briefly stated, are:

First. That from the year 1860 to 1865, no levy could legally be made, by reason of the stay laws then in force in the State of Georgia.

Second. That during the rebellion, by reason of the same, there was no *legal* officer in the State of Georgia, to make a return upon the said execution.

Third. That from June, 1865, to July, 1868, no levy and return thereof could be made, by reason of military orders and the acts of the constitutional conventions and General Assembly of the State of Georgia, prohibiting levies of executions.

The last objection is not true, in fact. Military orders and acts, staying the *sale* of property under execution during some *part* of the period mentioned, were passed; but a levy of this *fieri facias* and a return on the same could have been made.

If I deemed it incumbent upon me to consider the question, whether by reason of the rebellion there was during that period a legal officer in the State of Georgia to make a levy and a return upon an execution, I should consider it material, in coming to a conclusion, to have evidence as to whether the plaintiff was, during the rebellion, a loyal citizen of the United States, or a citizen of the State of Georgia and a participator in the rebellion. The objection might be well taken by a citizen of

one of the loyal States, who, by reason of the rebellion, was prevented from collecting his debt; while in the other case the legal maxim, "*No man shall take advantage of his own wrong*," might apply.

I, however, decide that this judgment has abated, resting my decision upon Section 2863 of the Code and the judgment of the Supreme Court of Georgia in *Battle* v. *Shivers*, rendered August 3, 1869.

The Supreme Court has given its interpretation upon the statutes of the State which affect this question, and by its decision the lien of all such judgments as this one is lost. The judgments no longer exist as such in the courts of the State. This judgment of Lassiter's having no lien upon the property of the bankrupt enforceable in the State court, no priority will be given to it here in the distribution of the money derived from the sale of the said property. It can stand no better in this court than it does where it was created, and where alone it would have sought to enforce its lien upon the property, if the same had not been brought here.

The Bankrupt Act recognizes as liens those only which are valid and binding by the laws of the State where the property is situated.

Respectfully submitted,

FRANK S. HESSELTINE,
Register.

ERSKINE, J.—I have read and carefully considered the question involved in this case, together with the opinion of the Register. I think his decision is clear, and expounds in incontrovertible language the law of the case. I approve and affirm the decision. The clerk will certify this affirmance to Mr. Register Hesseltine.

UNITED STATES SUPREME COURT—LOUISIANA.

The exercise by Congress of the constitutional power vested in them, to establish a uniform system of bankruptcy, repeals the insolvent laws of each particular State.

The United States Bankrupt Law does not, however, divest the State courts of the jurisdiction necessary to the final administration of the estate of an insolvent who had made a surrender previous to its passage.

MEEKINS, KELLY & CO. *v.* THEIR CREDITORS.

APPEAL from the Third District Court of New Orleans, FELLOWES, J.

ILSLEY, J.—This case presents the first application by this tribunal of the Act of Congress, approved 2d March, 1867, entitled "An Act to establish a uniform system of bankruptcy throughout the United States."

By the 50th Section of that act, it is in force for certain purposes from the date of its approval.

The legal effect of this exercise by Congress of a power vested by the Constitution of the United States is to repeal the insolvent laws of each particular State. *Sturgis* v. *Crowninshield*, 4 Wheat., 122; *Clarke* v. *Rosemba*, 5 Rob., 27; *Beach* v. *Miller*, 15 An., 602. Story on the Constitution, Section 1114.

And this well-settled doctrine received a legislative sanction in Louisiana by the act of the 27th of March, 1843, to revive the insolvent laws of Louisiana, an act passed immediately after the repeal by Congress of the United States Bankrupt Act of 1841.

Has this court jurisdiction to decree, as it is asked to do by the appellant, that this cause be remanded to be proceeded with as a *cessio bonorum*, notwithstanding the repeal of the State insolvent laws?

The proceeding in the lower court commenced by an application on the part of the plaintiffs, Meekins, Kelly & Co., for a respite, and the present appeal is taken by an opposing creditor from a judgment of the District Court, rendered in January, 1866, granting the respite.

An examination of the vote given at the meeting of creditors, and a comparison of that vote and the schedule filed, have failed to satisfy us that there has been a legal majority in favor of the respite, and the proceedings resolved themselves instantaneously into a *cessio bonorum*, which was accepted; and the acceptance of the cession vested all the property of the debtors in their creditors, and proceedings continue as if the cession had been offered in the first instance. Article 3065, La. Code. *Arcenaux* v. *His Creditors*, 3 La., p. 38.

In the case of *West* v. *His Creditors*, 5 Rob., 261, the doctrine is clearly announced, that the State tribunals were not deprived by the United States Bankrupt Law of any portion of their jurisdiction, necessary to the final administration of the estate of insolvents who had made a surrender previous to its passage, and we consider this the settled jurisprudence of the State. 8 Rob., 123. 4 An., 490. 15 An., 602. And that it is as applicable to the United States' Bankrupt Act of 1867 as to that of 1841, to which last Act of Congress the decisions refer.

It is therefore, for the reasons assigned, ordered, adjudged, and decreed that the judgment of the District Court be annulled, avoided, and reversed; it is further ordered, that the case be remanded, and that proceedings therein continue as if the cession had been offered in the first instance by the plaintiffs, cost in both courts to be paid by the insolvent estate.

Rehearing refused.

Buchanan & Gilmore, for plaintiffs and appellees.

Whitaker & Fellows, for appellants.

UNITED STATES DISTRICT COURT—RHODE ISLAND.

A general assignment by an insolvent firm of all the firm property for the benefit equally of all its creditors, untainted by actual fraud, is nevertheless an act of bankruptcy, as being, in contemplation of law, made with intent to defeat or delay the operation of the Bankruptcy Act.

Treating with the assignee and bankrupts by creditors, with an offer to assent to the assignment if the assignee should be changed, does not estop

creditors from proceeding in bankruptcy, though it is possible for creditors so to act as to be estopped in such a case.

In re SPICER & PECKHAM *v.* WARD & TROW.

KNOWLES, J.—This is one of the many cases in which the points presented for consideration are neither so novel, nor so disputable now, in 1870, as to require, or even to warrant a very elaborate statement on the part of the court, of the grounds of its decision.

The petitioners charge against the respondents three certain acts of bankruptcy. These, or some one of them, they are bound to prove under penalty of a dismissal of their petition with costs—and, of course, a liability to an action for malicious and unfounded prosecution. The respondents file a denial, in common form, and they challenge proofs of the criminatory allegations.

The essential allegation of fact in each of the three charges is, that on the 3d day of January, 1870, the respondents made and executed to one George W. Payton an assignment of all their property, as a firm, for the benefit equally of all the firm's creditors—which act, it is alleged, in the first specification, was done with the intent to hinder, delay, and defraud creditors; in the second specification, with intent to defeat and delay the operation of the Bankrupt Act—being insolvent; and in the third, with the same intent as last mentioned, being in contemplation of bankruptcy or insolvency.

The making of the assignment being admitted, and the insolvency of the firm at the time being fully proven, or conceded, it was denied on the part of the respondents that an act of bankruptcy within the purview of the Bankrupt Act was shown, and this upon two grounds.

The first of these was, that an assignment for the benefit equally of all creditors, untainted by actual fraud, was not, under the statute, an act of bankruptcy; citing in support of this position an opinion of Justice Swayne of the Supreme Court (overruling a decision of the Judge of the Southern District of Ohio), reported in 7 Law Reg., 427, and *Langley* v.

Perry, 2 N. B. R., 596, and an opinion of Justice Nelson of the same court, reported in *Sedgwick* v. *Place et al.*, 1 N. B. R., 673.

In this position of the respondents I am unable to concur. Granting, for the sake of argument, that these opinions of these distinguished jurists sustain fully the point to which they are cited (a concession, in my judgment, against the fact), I am constrained to say that I cannot assent to that construction of the Bankrupt Law for which the respondents here contend. Of the opinion of Justice Swayne, we have but a reporter's synopsis of points ruled—not a sentence of the author's reasonings—while, on the other hand, in 1 N. B. R., 559, we have the full opinion of Judge Leavitt, *In re Langley* v. *Perry* (the opinion overruled by Justice Swayne), in which, according to my judgment, the true construction of the Bankrupt Law, as regards the point in question, is given, with reasons therefor which seem to me unanswerable. Under the view of the law as here expounded, the making of the assignment of the 3d of January by the respondents was an act of bankruptcy, because made, in contemplation of law, with intent to defeat or delay the operation of the Bankrupt Act. Says the Judge, "The intention of the law clearly was, that when a failing debtor was conscious of his inability to prosecute his business and pay his debts, he should at once subject his property to such a disposition as the Bankrupt Law has provided for. The property then becomes a sacred trust for the benefit of his creditors, who have a right to insist that it shall be administered, not according to the wish or preference of the insolvent, or in accordance with the insolvent law of the State, but according to the provisions of the National Bankrupt Law."

This, in my judgment, is the sounder construction of the Bankrupt Law, as to the point in question, and by reference to the case of *Randall & Sunderland*, 3 N B. R., 18, it will be seen that Judge Deady, of the District of Oregon, entertains a similar view, and in its support has given to the profession an argument which few of his brethren of the North, the South, or the East will attempt to refute, to strengthen, or amend. *In*

re Goldschmidt, 3 N. B. R., 166. The view is adopted by Judge Blatchford, of S. D. of N. Y.

But secondly, say the respondents, supposing the assignment to be an act of bankruptcy, these petitioners are estopped by certain acts of omission or commission from complaining thereof in this court by petition. They have, say the respondents, delayed filing their petition for sixteen days from the date of the assignment; have within that period often conferred with the respondents and their assignee, concerning the condition of the estate, and have sought to sell their claim against the respondents to the assignee for about half its amount; and last, but not least, have offered to assent to the assignment, and refrain from proceedings under the Bankrupt Law, if the respondents and the assignee would surrender the property assigned, and commit its disposal and management to some person more satisfactory to the petitioners and other creditors than was the assignee named, who, it was conceded, was personally unacquainted with the business of the assignors, and who insisted on employing, as his agents, for the purposes of the trust, the assignors themselves.

As to this ground of defense, it seems needful merely to say, that the facts in proof are, in my view, insufficient for the exigency. That a creditor may be estopped by his acts or declarations, from proceeding in bankruptcy against a debtor, no matter how culpable the debtor may be, is readily conceded; and that a court should always aim, by recognizing the doctrine of estoppel, to subserve the interests of good morals and fair dealing, is also conceded. Still, in my view, before it can adjudge a creditor estopped from invoking against a debtor the powers of a court of bankruptcy, he should be held to prove other facts, and more pertinent and significant than those proven in this case—and this, though it were not shown by the creditor, as it is shown in this case, that proceedings in bankruptcy were resolved on by the petitioners as soon as it was ascertained that the debtors would not assent to a substitution of any assignee in the place of one chosen by them, and that within seventeen days next succeeding the date of the act of

bankruptcy their petition against their guilty debtors was filed.

It is gratifying to the court to be warranted in adding, that no corrupt intent to defraud a creditor, or to contravene any statute of the State, is imputed to the respondents or their learned counsel by the petitioners, or is imputable to them upon the evidence. But on the other hand, it is anything but gratifying to learn, what is shown by the testimony in this cause, that there is much reason to doubt whether, even at this late day, the community at large fully realize as a veritable fixed fact, that under this Bankrupt Law, so far as concerns the relations of debtor and creditor, the mode of conducting business, and the possession and disposal of property by parties of blighted credit or in embarrassed or straightened circumstances, "old things have passed away, and all things have become new." For many years past, it has been known everywhere, in Gath and Askalon, as well as in Providence and Newport, that in Rhode Island, assignments were upheld by our courts in conformity with State laws, which in any other State in the Union would at sight have been set aside as fraudulent, by any Judge or Chancellor. The Bankrupt Law, it should now be remembered, practically nullifies these State laws, and stigmatizes as fraudulent, in fact or in law, many a practice which the business men and legislators of Rhode Island have been wont to uphold and commend, as pre-eminently conducive to the prosperity of all of the State's multiform industrial pursuits and enterprises.

In the controversies, wherever raging, in relation to the expediency of the enacting of the Bankrupt Law, or the expediency or inexpediency of its repeal, the Bench cannot, without impropriety, participate. Its duty is done, when, as cases arise, it expounds, applies, and administers the law, and as the law's organ, makes known to the community those rules of conduct to which the citizen will be required to prove conformity on his part when it shall have chanced that, for or against him, the searching, potent, and inevasible processes of the Bankrupt Law shall have been invoked.

The respondents are adjudged bankrupts.

Decree entered, declaring the firm of Ward & Trow bankrupts.

UNITED STATES CIRCUIT COURT—S. D. NEW YORK.

Wife of bankrupt petitioned the Circuit Court to review a decision of the District Court on a claim of the assignee, that she held valuable stock that belonged to her husband.

Held, assignee cannot recover assets from third parties by summary proceedings, but must do so by bill in equity or suit at law. Such a case should therefore come up by appeal, and not by petition. Decree of District Court set aside as irregular, with leave for assignee to file bill, without costs.

In re JOHN N. BONESTEEL.

NELSON, C. J.—This is a petition of Mrs. Bonesteel, to review a decision of the District Court, on a claim by the assignee that she held eleven hundred and forty-five shares of stock in a Nicholson Pavement Company in Brooklyn, that belonged to her husband. The proceedings against her were by petition in a summary way, by the assignee, to compel her to show cause why this stock should not be transferred to him. The stock is said to be of the value of thirty thousand six hundred dollars. We have heretofore held that the suit by the assignee against a third person to recover assets claimed to belong to the bankrupt, should be commenced by bill in equity, or suit at law, under the third clause of the 2d Section of the Bankrupt Act. This decision was made shortly before the question in this case occurred. In that case we directed that the petition and answers be amended, and stand for bill and answer. In that case, however, the proceedings had not extended beyond those pleadings. An application is now made in this case to revise the decision in the court below on petition, which, if the proceedings are to be regarded as founded on a bill in equity, could not be entertained, as the remedy in such a case could only be by appeal under the 8th Section of the act. As we have not reformed the proceedings in this case, as was done in the case referred to, and as the practice has been heretofore very much unsettled, and to hold now in the case that the

remedy is by appeal, and not by petition, the time for appeal having been passed, would preclude all relief; we think it will be best, and in furtherance of justice to all parties concerned, to set aside the order or decree of the court, as founded on irregular proceedings, with leave for the petitioner, the assignee, to file a bill in the usual way against Mrs. Bonesteel, without costs to either party. In the case of *In re* Alexander, 3 N. B. R., 29, before the Chief Justice, I understand this to be according to the true construction of the act, and also in a case before Judge Clifford.

The petition of Mrs. Bonesteel granted.

SUPERIOR COURT—NEW YORK CITY.

Nothing in the Bankrupt Act declares the U. S. Courts the only forums where a distribution of a debtor's property can be consummated; and the jurisdiction of other tribunals of competent authority is neither expressly nor impliedly excluded.

A State court having acquired jurisdiction, a U. S. Court has no authority by which it may oust the jurisdiction of the State court. *In re* Campbell 1 N. B. R., 165.

Clark *v.* Bininger.

McCunn, J.—The motion is to punish the respondent, John S. Beecher, for contempt of court, in violating an order of injustification, and in disturbing the possession of a receiver appointed by order of this court.

The respondent admits the facts constituting the contempt, but urges, in justification, an alleged authority as assignee in bankruptcy, to demand and receive possession of the property in the hands of the receiver of this court.

Thus, the single question before me, is the sufficiency of the justification presented by the respondent, and the decision of that question turns on the authority of the Federal Court in bankruptcy, to interfere with or to arrest the proceedings of a State court in the ordinary and legitimate administration of justice.

The action in this court was in the nature of a bill in equity,

brought by one partner against another on the dissolution of the copartnership, for the purpose of winding up the copartnership, paying the creditors, and adjusting the reciprocal rights and equities of the copartners. That action is progressing in an orderly course of development toward a final judgment, wherein the rights and interests of the several creditors, as well as of the partners *inter sese*, will be ascertained, adjusted, and protected upon the principles of equity applicable in analogous cases.

In aid of the ultimate relief an injunction was granted, and a receiver appointed, with a view to the protection of the copartnership property, *pendente lite.*

The action was commenced on the 19th day of November, 1869; on the 19th day of November, 1869, a receiver of the copartnership property was appointed; on the said 19th of November, the receiver executed and filed the requisite bond; on the said 19th of November the receiver took possession of the copartnership property, and has remained in possession to the present moment.

The regularity and validity of these proceedings in this court, are not to be impeached by any Federal tribunal. (See Art. IV., U. S. Constitution; *ex parte* Burns, 1 N. B. R., 177; B. R. Sup. xxxvi.; *Atkinson* v. *Prendy*, Crabbe, 551; *United States* v. *Howland*, 4 Wheaton, 15; 1 Wheaton, 25.)

The instant the receiver took possession, the copartnership property passed into the custody and control of this court, of which he was the officer. His possession is the possession of the court.

So by virtue of the order of this court appointing the receiver, and the filing his bond in pursuance of that order, the receiver was vested with the legal title to all the copartnership property; that property, in contemplation of law, is no longer the property of the copartnership, and their only interest in it is an equitable right to whatever surplus may remain after satisfaction of the copartnership's creditors.

On the 11th of December, 1869, proceedings in bankruptcy were commenced against the copartnership of Bininger &

Clark; on the 22d of December, 1869, they were adjudicated bankrupts; and afterward, on the day of , John S. Beecher was appointed assignee.

Afterward, on the day of January, 1870, the said assignee demanded of the said receiver, the possession of the property of the said copartnership, which possession the receiver refused to surrender or deliver to the assignee.

Recognizing and respecting the legitimate powers of the District Court, I nevertheless contest the authority of that honorable court to oust the already attached jurisdiction of the Superior Court, and to compel the surrender, by its officer, of property duly and lawfully in its custody, and which is now in course of judicial administration.

That court, as a court of bankruptcy, is the creature of statute, and has no power beyond that expressly conferred upon it. (*Ex parte* Hugh Campbell, 1 N. B. R., 165.)

Antecedently to and independently of the Bankrupt Act of 2d March, 1867, that court had no authority to enjoin parties or proceedings in a State court, nor otherwise in any way to interfere with its process or proceedings. (Act of March 2, 1793; 1 Kent's Com., 412; 3 Story's Com. 521–626.)

No such authority is conferred by the Bankrupt Act of 2d March, 1867—neither in terms nor by implication. (*Ex parte* Campbell, *supra*; *Clarke* v. *Rist*, 3 McLean, 494; Matter of Burns, 1 N. B. R., 176; *Atkinson* v. *Purdy*, Crabbe, 557.)

The Bankrupt Act expressly reserves and preserves intact all liens existing at the commencement of the proceedings in bankruptcy. (Section 14, Bankrupt Act, 1867; *Clarke* v. *Rist*, *supra*; *ex parte* Donaldson, 1 N. B. R., 181; Matter of Allen, 1 N. Y. Legal Obs., 115; *Re Houseberger* v. *Zibelien*, 2 N. B. R., 95, 272.)

Upon familiar principles, each partner has a *specific lien* on the copartnership property, for the satisfaction of the copartnership debts, and for the payment of any surplus that may remain to him after the adjustment of the rights and equities between themselves; and the object of a suit in equity between partners—particularly of the action in the Superior Court—is

to enforce and effectuate that lien. (Lindley on Partners, 577 *et seq.*)

The intent and policy of the Bankrupt Law of 1867, is to insure an equitable appropriation of the debtor's property to the satisfaction of the claims of creditors; hence, the only transfers and assignments which it denounces and invalidates, are transfers and assignments *in preference* or *in fraud of creditors*. (Section 39.) Nothing in the Bankrupt Act distinguishes and declares the District Court the only forum where a just and equitable distribution of the debtor's property can be consummated; and the jurisdiction of other tribunals of competent authority, except in administration of bankruptcy, is neither expressly nor impliedly excluded.

When this court acquired jurisdiction of the copartnership, no proceeding in bankruptcy had been instituted, and there was then no pretense of claim for the jurisdiction of the District Court.

The amity subsisting between the tribunals of kindred and associated governments, forbids the suggestion in the District Court that the action in this, the Superior Court, can terminate otherwise than in an equitable administration of the copartnership effects; nor can it be contended for a moment that the commencement of an action in a State court is an act of bankruptcy, nor is it obnoxious to the provisions or policy of the Bankruptcy Law.

The Superior Court of the city of New York, and the District Court, in administering the affairs of dissolved or insolvent copartnerships, proceeds upon the same principles, and with an equal solicitude to protect the rights of creditors; hence, there is no occasion, with a view to justice or equity, why the District Court should attempt to oust the jurisdiction of this court.

My position is grounded as well upon authority as reason. In the cases cited below—all Federal adjudications—the power and jurisdiction claimed for the District Court were, in some instances, impliedly, and in others, most expressly and distinctly disclaimed, and repudiated by the very tribunals in whose

favor these anomalous pretensions were asserted. (*Sedgwick, assignee*, v. *Minck et al.*, 1 N. B. R., 425, 675; *Sedgwick, assignee*, v. *Place et al.*, 1 N. B. R., *quarto* 204, *octavo* 673; *in the matter of* Hugh Campbell, *supra; In re* Burns, *supra;* Hawkin's Appeal, 2 American Law Times; *Taylors* v. *Canyl*, 20 How. U. S., 584; *ex parte* Allen, 1 N. Y. Legal Observer, 115; *Clarke* v. *Rist*, 3 McLean, 494; *Sullivan* v. *Hieskell*, Crabbe, 525; *ex parte* Dudley, 1 Penn., L. J., 302, 323; *Atkinson* v. *Purdy*, Crabbe, 557; *ex parte* Donaldson, 1 N. B. R., 181; *in the matter of* Smith, 1 N. B. R., 169; *In re* Miles W. Hill, 2 N. B. R., *octavo*, 140; *Langley* v. *Perry*, 2 N. B. R., 596: *Farrin* v. *Crawford*, 2 N. B. R., 602; *In re* Marks, 2 N. B. R., 575; *Re* Hazleton, 2 N. B. R., 12, 31; 4 Cranch. 179; 7 How. U. S., 612, 625.)

Let us see what some of the most learned and eminent members of our Federal courts say upon this subject. In 1868, Judge McCandless, of the Western District of Pennsylvania, says, in the matter of Hugh Campbell, a bankrupt, cited above (that was a motion to dissolve an injunction against the sheriff, and which was granted): "Have we the right to interfere with the courts of a State in the legitimate exercise of its functions? After much reflection, I am satisfied we have not, nor with the actors or parties litigating before them." After citing some portions of the Bankrupt Law, whereby those without legal acumen might be led to think some power was granted to interfere with State courts and their proceedings, he says, "Staring them in the face was the Act of the 2d of March, 1793. Section 5 expressly declaring 'nor shall a writ of injunction be granted to stay proceedings in any court of a State;'" and Judge McCandless, in the same case expressly holds, "that there is nothing in the Bankrupt Law to repeal this statute;" and the authority conferred by the 40th Section of the act to protect the debtor's property, was not intended to refer to the courts of a State or to its officers. "It does not refer to the courts of a State, or to their executive officers. It was not designed to arrest the whole machinery of another and independent forum, which is exercising its best efforts to marshal

the assets of the debtor, and after discharging the legitimate liens to which they are subject, reserving the residue as a fund in bankruptcy;" and I hold, that there could not be language more in point to the case at bar than this language. Again, he says: "When the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another court; these rules have their foundation, not merely in comity but in necessity." Again, he says: "neither can one take property from the custody of the other by replevin or other process, for this would produce a conflict of jurisdiction extremely embarrassing in the administration of justice." * * * Hence, he says, "that the United States Court has no supremacy or power by injunction over the State courts," and he holds "that there is no power in the Bankrupt Law, limiting the jurisdiction of the State courts, *nor does it confer any power on the Bankrupt Court to supersede their jurisdiction or wrest property from the custody of their officers;*" on the contrary, he says, "In other words, as to the estate or property of the bankrupt, the assignee is *only* subrogated to all his rights and responsibilities. The act (Bankrupt Act), sends the assignee to the State courts, and admits its power over him. It confers no authority on this court (the United States Court) to restrain proceedings therein by injunction or other process, much less to take property out of its custody or possession with a strong hand;" and he finally concludes by saying that, "We shall, therefore, be compelled to dissolve this and all other injunctions in similar cases, Mr. Justice Grier fully concurring in the above views." Mr. Justice McCandless holds even stronger language in the case of William Burns, a bankrupt, and reported in B. R. Sup., xxxviii, *octavo*, 174. There he holds, that if the lien upon the property is fraudulent or void, its validity must be tested in the State court. So in the case of *Atkinson* v. *Purdy* (Crabbe's R., 556), Mr. Justice Miller, of the Supreme Court of United States, holds that the true and proper remedy for the assignee is in the State court, where there is a controversy about the insolvent's property, and Mr. Justice Leavitt

of the same court held, in the case of *Clarke, assignee*, v. *Rist*, cited above, "That the equitable interests of the bankrupt in the property in question, did not pass or rest in the assignee, and that the United States Court had no power to withdraw the interests of property from final disposition of the State court." In finally disposing of that case, the learned judge said: "When a State tribunal has taken jurisdiction of a case, though having connection with an estate in bankruptcy, it affords no sufficient reason for its withdrawal from that jurisdiction, that a Federal court might take cognizance over it; and it is proper that the Federal courts should cautiously abstain from the unnecessary exertion of powers which may bring them into conflict with the State courts." For, as he properly observes, "Nothing can tend to the more serious disturbance of the harmonious action of the State and Federal authorities than such conflicts."

In conclusion, I am obliged to adjudge the respondent guilty of a technical contempt of court; but in consideration that he disavows any intentional disrespect of our authority, and protests his conduct was controlled by the advice of counsel, I will dismiss him with only a nominal punishment. So much suffices for the vindication of our authority. I trust the respondent will spare us the necessity of any more severe assertion of that authority.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

A partner brought action in State court against his copartner for a settlement and winding up of the partnership; and receivers were appointed who took possession of the partnership property. The firm, with its partners, was subsequently adjudged bankrupt, on petition of creditors, and assignee in bankruptcy was appointed, who applied and obtained an order from the United States District Court, enjoining the plaintiff to the actions in the State court from further proceedings therein, and that he execute proper instruments to substitute therein the assignee in bankruptcy. On further application of assignee that an order issue for the marshal to take possession of the joint property from the receivers of the State court, etc.,

Held, no allegation is made impeaching the validity of the transfer to and lawful custody of the joint property by the receivers of the State court,

and the Bankruptcy Court has no jurisdiction to grant the particular relief asked. Application denied.

In re ABRAHAM B. CLARK AND ABRAHAM BININGER.

BLATCHFORD, J.—This court, on the 17th of February last, suspended a decision on certain of the matters prayed for in the petition of the assignee in bankruptcy. Those matters were, the prayer that this court will order the marshal to take from the possession of the receivers the joint estate and property of the bankrupts, now or heretofore in the possession of the receivers, and the prayer that this court will enjoin the receivers from any further interfering with the said property. At the same time an order was made by this court on such petition, directing the execution by the bankrupt Clark of the proper papers to enable the assignee in bankruptcy to be admitted to prosecute in his own name the action brought in the State court by him against the bankrupt Bininger, in which petition the receivers were appointed, in the same manner and with the like effect as it might have been prosecuted by Clark, and enjoining Clark from further prosecuting such action, or applying for or consenting to any order therein, or opposing any application to the State court by the assignee in bankruptcy to have any attorneys of his substituted for the attorneys of record in such action for the bankrupts, or to have any attorneys of his recognized by the State court as attorneys in such action for the bankrupts as nominal parties thereto; and also enjoining the bankrupts from interfering with the property then or theretofore in the possession of the receivers, and giving leave to the assignee in bankruptcy, in the name of the bankrupt, Clark, or otherwise, to apply to the State court for such orders in such action as he might be advised. Thereupon, on the 23d day of February, and again on the 24th, the assignee applied to the State court for an order adjudging that as the former interests of both of the parties to the action in that court in the property in controversy therein had become by the Bankruptcy Act vested in the assignee in bankruptcy, such action had abated for want of proper parties to prosecute or defend the same, and that such assignee was entitled to the property

in controversy in the cause, subject to any lawful right or claim of the receivers, for the purpose of disposing of the same pursuant to the Bankruptcy Act, and directing a discontinuance of such action, and a dismissal of the complaint therein. The question of the granting of such order by the State court has been postponed, to be heard on the 5th of March instant.

The assignee now renews his application to this court for an order to the marshal to take the property in question from the possession of the receivers, and to enjoin the receivers from any further interfering therewith. This application is founded on the petition before presented, and on an affidavit made by the assignee on the 23d of February, in which he sets forth that he is unwilling to make any further application to the State court, lest he may expose himself to censure and punishment from said court; that he believes that if this court has jurisdiction to take from the receivers the possession of the property in controversy, there is a great necessity for the exercise of such jurisdiction, and he prays that it may be exercised; that the claims of the receivers for compensation and fees are extravagant and far beyond what the law allows; that while he does not apprehend that the State court will make any allowance beyond what the law authorizes, yet he believes that the receivers will persist in their extravagant demands, and that, by reason of the appeals which are permissible in the State courts, a very great length of time must necessarily elapse in case an attempt is made to adjust such fees in the State courts; and that, so long as the receivers are permitted to retain the property as security for a lien which does not exceed five per cent. of its actual value, sales are prevented, expenses are accruing, and waste is committed. The affidavit concludes with the prayer that if this court decides that it has no jurisdiction or power to take the property from the custody of the receivers, and put it into the custody of the assignee, to the end that without prejudice to the lien and claim of the receivers it may be converted into money, this court will direct the assignee to apply to the State court, so that he may be, at that court upon the order and permission of this court,

and may not seem voluntarily to have gone out of, or waived any reliance upon the jurisdiction of this court.

The petition of the assignee, on which this application is founded, and which makes the bankrupts and the receivers parties thereto, is not founded upon any allegations that the transfer of property effected by the proceedings in the State court was void under the 35th or 39th Section of the Bankruptcy Act, nor does it pray that such transfer may be adjudged void and set aside. On the contrary, it sets forth, on its face, that prior to the commencement of the proceedings in bankruptcy the action in the State court was brought, and one of the two receivers was appointed by that court, and such receiver had taken possession of the property in question. The property is still in his possession, and in that of his co-receiver, and the application to this court is that, under these circumstances, this court will summarily declare such property to have so been the property of the bankrupts at the time of the commencement of the proceedings in bankruptcy, and to have so passed to the assignee by the assignment in bankruptcy to him, as to warrant this court in directing the marshal to forcibly dispossess the receivers, and take the property and put it into the hands of the assignee. The jurisdiction of the State Court over the subject-matter of the suit therein, and over the parties thereto, when it was instituted and the receiver was appointed, and its jurisdiction to appoint such receiver, are in no manner impeached or questioned. It is only claimed that by reason of subsequently transpiring events this court shall decide that the State Court ought to, and shall be made, by compulsion from this court, to give up possession of the property, without its being shown that such possession of the property by the State Court can be properly adjudged by this court to be void or invalid by reason of provisions of the Bankruptcy Act.

It would seem to be only necessary to state these propositions, to reach the conclusion that this court cannot grant the particular relief asked. The questions involved were considered by this court in the case of *In re* Vogel, 2 N. B. R., 427.

When property is lawfully placed in the custody of a receiver, by the court which appoints such receiver, it is in the custody and under the protection and control of such court for the time being, and no other court has a right to interfere with such possession, unless it be some court which has a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. *Peck* v. *Jenness*, 7 Howard, 612, 625; *Williams* v. *Benedict*, 8 *Id.*, 107, 112; *Wiswall* v. *Sampson*, 14 *Id.*, 52, 66; *Peale* v. *Phipps*, *Id.*, 368, 374; *Taylor* v. *Carryl*, 20 *Id.*, 583, 594 to 597; *Freeman* v. *Howe*, 24 *Id.*, 450; *Buck* v. *Colbath*, 3 Wallace, 334. In the present posture of this case it does not appear that this court has such superior jurisdiction in the premises, or such supervisory control over the State court in respect to the property in question, as to authorize it to take away from the State court the possession of such property, or to enjoin the receiver from further interfering with such property. This court will always be sedulous to enforce its just powers, but it will not demand from any other tribunal anything which it would not itself be willing to concede under like circumstances. In the case referred to of *In re* Vogel, it compelled the restitution to an assignee of bankruptcy of property which had been taken away by process of a State court from the custody of this court, and its decision was affirmed by the Circuit Court on review. The principle on which such restitution was enforced would authorize the State court, in the present case, to compel restitution to its receivers of such property as this court should take away by force from the custody of such State court, and this court might then retaliate, and the confusion and endless strife would ensue which are so forcibly characterized by the Supreme Court in the opinion delivered in the case of *Buck* v. *Colbath*, before cited.

In respect to the application made at the conclusion of the assignee's affidavit, that this court will direct him to apply to the State court, so that he may be acting in that court on the order and responsibility of this court, and may not seem vol-

untarily to have gone out of or waived any reliance upon the jurisdiction of this court, inasmuch as he has asked and obtained from this court an order, providing him with the means of being admitted to prosecute, in his own name, the action in the State court, and enjoining the bankrupt, Clark, from opposing his application to the State court in the premises, and giving him leave to apply to the State court for such orders in the action as he should be advised to apply for; and, inasmuch as he has applied to the State court for the granting of the order before mentioned, discontinuing the action in that court, and dismissing the complaint therein, it seems hardly necessary that this court should direct him to apply to the State court.

The applications are, therefore, denied.

F. N. Bangs, for the assignee.

J. F. Morgan, for the receivers.

UNITED STATES DISTRICT COURT—MAINE.

1. G. was carrying on lumbering operations, and applied to H. for assistance, who made, on February 5th, advances for that purpose, and received as security therefor (and what he should owe him on settlement), an assignment of G.'s permits. G. filed his petition in bankruptcy February 29th. H. made other advances on March 21st, and transferred his claims against G. to P., who received from H. a transfer of the permits, and made other advances to G., to complete the operations. The assignee sold the logs by order of court under Section 25, and the cause was referred to the Register to settle and adjust accounts.

Held, that under Section 14, the title of the assignee relates back to the date of filing the petition in bankruptcy; that the advance of February 5th was a legal claim, and should be paid by the assignee; that the advances subsequent to February 29th, constitute an equitable claim only, and should be confined to discharging lien claims for labor, getting the logs to market, and stumpage, etc.

2. G. at the same time cut other logs on land of which he had W.'s bond for a deed. When these logs came to market, W., claiming them as his own, by reason of an alleged forfeiture of the bond, assigned his interest in them to G., at the same time conveying to G. the land by deed.

Held, that the assignee's right to require G. to account for the proceeds of the logs, and convey to him the interest which he acquired of W. in the land, depends upon the question whether or not W.'s bond had been forfeited.

In re THOMAS B. GREGG.

FOX, J.—In this case the assignee has disposed of a large

quantity of logs, cut by the bankrupt in the winter of 1867–8, under permits from the owners of two tracts of timber land, and questions have arisen as to the amount of certain liens alleged to exist thereon. The whole matter has been referred to Register Hamlin, and the questions are now presented for decision, on his report, and the depositions accompanying it.

First. The bankrupt filed in this court his petition to be adjudged a bankrupt on February 29th, 1868, and the decree of bankruptcy was entered on the 30th of March.

On the 5th day of February, 1868, the bankrupt assigned the permits for lumbering to one Hayford, as "security for the payment of any and all sums he might owe him on settlement," and on the same day Hayford advanced to the bankrupt his two notes of two thousand one hundred dollars each, on five and six months, without interest, payable to Gregg, charging them to him on account, together with a commission amounting to two hundred and ten dollars. The assignment of the permits and the lumber cut under them, was given as security for these advances; a lien on the timber was created thereby for their payment, and these sums should be paid by the assignee, from the proceeds realized by him from the sales of this lumber.

Hayford is not, however, at present, the owner of this claim, having, on the 4th day of July, in consideration of eight thousand four hundred and two dollars paid to him by one Pearson, assigned to him all his account against Gregg, together with the two permits. A written agreement to make and accept such an assignment having been entered into between Hayford and Pearson on the 10th day of April.

Under this assignment, Pearson claims to be subrogated in place of Hayford to *all* of Hayford's claims and securities against the bankrupt. It appears that on the 21st of March, Hayford made to the bankrupt a second advance of his notes, three in number, each for two thousand and seventy-five dollars, charging them to him on account, and also a commission of three hundred and eleven dollars and twenty-five cents. These notes were discounted for the bankrupt, at the rate of

nine and one-quarter per cent., including brokerage. Hayford at the same time advanced to the bankrupt in cash, six hundred and sixty-seven dollars and thirty-eight cents. After the notes were discounted, the bankrupt paid back from their proceeds, to Hayford, on the 21st day of March, two thousand nine hundred and sixty-nine dollars and seventy-three cents, and this amount was passed by him to the credit of the bankrupt, with interest at the rate of eight per cent. for the time the notes had to run, and commissions one hundred and forty-eight dollars and fifty cents.

The purpose of this arrangement is not very apparent; there is something inexplicable in this way of lending a party money, furnishing him with the lender's notes to a larger amount than the borrower needed, and his getting them discounted at nine and one-quarter per cent. and paying over to the lender the surplus beyond his necessities, which amount is credited to him with interest at eight per cent. only; but the parties testify such was the transaction, and in the view I take of their rights, it is not very material to determine upon the propriety of such an arrangement. The report finds that the bankrupt filed his petition in bankruptcy in this court on the 29th of February. Hayford advanced him his notes on the 21st of March subsequently, not knowing of the filing of such petition, and his assignee Pearson claims, that Hayford is to be considered in the light of a *bona fide* purchaser without notice, making the advances in good faith, ignorant of any proceedings in bankruptcy, and relying on the security which he held through the permits which had been assigned to him February 5th, and which were to be "held by him as security for the payment of any and all sums Gregg might owe him on settlement."

The 14th Section of the Bankrupt Act provides: "That as soon as the assignee is appointed, the judge, etc., * * * or register, shall by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, *and such assignment shall relate back to the commencement of proceedings in bankruptcy*, and thereupon, *by operation of law*,

the title to all such property and estate, both real and personal, shall vest in said assignee." The 38th Section of the same act provides, "that the filing of the petition for adjudication in bankruptcy, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act." Form No. 18, as prepared by the justices of the Supreme Court for the Assignment of the Bankrupt's Effects, in terms conveys and assigns "to the said ——, assignee as aforesaid, all the estate, real and personal, of the said ——, bankrupt, aforesaid, including all the property of whatever kind of which he is possessed, or in which he was interested, or entitled to have on the —— day of ——, A. D. 18—," which is the day of filing the petition.

Under the present act, I hold, that from the moment the petition in bankruptcy was filed, the bankrupt had lost all power of disposal of any portion of his property; and any subsequent conveyance or transfer by him was a nullity, and absolutely void as against the assignee. The assignment was subsequently executed by the Register, but its effect must depend entirely on the language of the act, and it is expressly enacted that the assignment when made, shall relate back to the commencement of the proceedings, which is declared to be the filing of the petition. "The Register, by such assignment merely executed a power devolved upon him by law; he conveyed no interest of his own; the property which passes by it, is transferred by force of the statute, and therefore the legal effect of such transfer depends little upon the terms of the assignment, either as to the property transferred, or the time at which it shall take effect, but its legal effect and operation must depend upon the provisions of the statute. It is purely a statute title, under which an assignee claims the estate of the insolvent, and to the statute he must look for the nature and extent of that title." Shaw, C. J., in *Clarke* v. *Minot*, 4 Met., 346.

An entirely different time for the divesting the property of the bankrupt is found in the former Bankrupt Act. By the 3d Section of the Act of 1841, it was provided "*that from the time of the decree of bankruptcy*, the property shall be deemed

to be divested out of such bankrupt, without any other act or conveyance whatever."

Under the English bankrupt acts it has been frequently decided, that when an assignment is made under a good commission of bankruptcy, it relates back to *the act of bankruptcy*, and avoids all *mesne* conveyances, excepting when made *bona fide*, more than two months before the date and issuing of the commission. The law on this point is clearly stated by Bosanquet, J., in his opinion in *Balme* v. *Hutton*, 9 Bing., 471. He says, "It is not to be disputed, with respect to persons in general, that after an assignment, by the Commissioners, all property of the bankrupt is liable to be treated and dealt with, not merely as actually being, but as having been from the time of the act of bankruptcy, the property of the assignee, and that persons who possess themselves of such property, or dispose of such property to others, are liable to be sued for a tortious conversion in actions of trover. This liability to answer in an action of tort to the assignee, does not depend upon any actual or presumed knowledge, on the part of the defendant, of the existence of an act of bankruptcy. The act of bankruptcy subjects the property of a trader to the right of his assignees, in the event of a commission, and when the assignment has been executed, the title of the assignees is completed, by relation, from the date of the act of bankruptcy. The effect of this relation may sometimes produce hardships to individuals who may have purchased or disposed of property with perfect honesty and good faith. But the necessity of adopting a retrospective measure for the prevention of fraud, has been thought sufficiently to counterbalance the evil of such occasional hardship. Even those persons who purchase goods, sold by the sheriff under an execution against a trader, are liable to be sued in trover for the value of the goods, by assignees claiming under a commission subsequently issued, if an act of bankruptcy appears to have been committed by the trader before the sale. A limit, however, has been set to this retrospective effect of the Bankrupt Act by provisions introduced into the later statutes, by which parties who act *bona fide* and without

notice of an act of bankruptcy, are protected, unless a commission shall have issued within a certain time." This principle has even been applied to a transfer of negotiable paper by a bankrupt, and the title of an innocent holder of a bill of exchange by transfer from a bankrupt, has been made to yield to that of the assignee. *Willis* v. *Freeman*, 12 East, 657.

In *Kynaston* v. *Crouch*, 14 M. & W., 266, a trader committed a secret act of bankruptcy by leaving his house, but, before he left, desired the defendant, his foreman, who had been accustomed to manage his business, to carry it on in his absence. The defendant accordingly did so, and received several sums of money for debts due the bankrupt, and for goods sold after the act of bankruptcy. He also made several *bona fide* payments, some to creditors of the bankrupt for expenses of housekeeping, and retained some for wages due himself; the moneys were received and the payments made, without notice of any act of bankruptcy. An action of money had and received, was brought by the assignees, and the defendant pleaded never indebted, and set-off. It was decided that the defendant was liable to the assignees for all the money received by him after the act of bankruptcy, and that he was not entitled to set-off any of the payments made by him.

The case of *Copeland, assignee*, v. *Stein*, 8 T. R., 199, is not unlike the present. In that case a trader, after a secret act of bankruptcy, consigned goods to a factor, who agreed to advance money thereon, and, accordingly, accepted and paid bills drawn on him by the trader; a commission of bankruptcy afterwards issued against the trader on such prior act of bankruptcy, after which the factor sold the goods and received the money, and it was held that he was answerable to the assignees for the value of the goods.

Lord Kenyon said: "A decision in favor of the defendant would be contrary to all the bankrupt laws, and to the cases that have been determined upon them, on the ground of relation back to the act of bankruptcy. * * * The doctrine of relation obtains universally, through all the bankrupt laws, except in the cases that are particularly excepted, and this case does not come

within either of those exceptions. The argument of the defendant goes the length of asserting that if a bankrupt, after a secret act of bankruptcy, sell or mortgage his estate, such sale or mortgage will be valid. It is true that if no commission be taken out for five years after the act of bankruptcy was committed, such sale would be good; but, in no other case can such a sale be protected. In the present case the goods were delivered in October, 1796; but now it appears that the bankrupt, by having committed a secret act of bankruptcy two months before, was incapacitated from disposing of these goods, to the prejudice of his creditors at large. This is a hard case on the part of the defendants, but we are compelled to decide against him by positive law, and can only say, '*ita lex scripta est.*'"

The case under the English bankrupt acts is certainly much harder for a party dealing with the bankrupt than under the act of Congress. By the English law the acts of bankruptcy may be secret, of such a nature as it would be impossible for the party to be advised of. No means exist by which the utmost diligence could protect a party and give him knowledge of such act on the part of the bankrupt; whilst, by our Bankrupt Act, the records of the Court in Bankruptcy are always open for inspection, and it is not until the petition is filed in court, that the statute declares "that the property shall be divested." The fact is, therefore, within the means of knowledge of any one dealing with another, if he will take the trouble to consult the records of the court, the 38th Section declaring that the docket shall be open to public inspection. It is a record of the same public nature as the registry of deeds. The record of a deed is legal notice of the conveyance to all parties interested, and, in the same manner, Congress has enacted that the filing of the petition in court shall be conclusive upon the rights of all parties, and from that time the bankrupt shall have no control or disposition of the property formerly belonging to him. As remarked by C. J. Shaw, in *Clarke* v. *Minot*, *ubi supra*, "it seems to have been the obvious policy of the statute to fix some precise point of time at which

the whole property and effects of the debtor shall be deemed to have passed from him and vested in the assignee."

I am, therefore, of the opinion that Hayford did not acquire any legal right to hold the permits and timber cut by virtue of them, as security for the cash and notes advanced by him to the bankrupt on the 21st of March, as the petition in bankruptcy was filed February 29th, and Hayford must be deemed, in law, to have had constructive notice of its filing and of its effect under the operation of the Bankrupt Law.

It is claimed that if Hayford acquired no legal rights to hold the permits and timber as security for his advances of March 21st, still he has a right in equity, to look to them as security for such advances, on the ground that the assignee takes the property of the bankrupt, subject to like equities with the bankrupt. It is true that such is the title of the assignee. Mr. Justice Story, in *Mitchell* v. *Winslow*, 2 Story, 650, has examined this matter with his usual care and learning, and most clearly vindicates and enforces the doctrine that assignees, except in cases of fraud, are affected with all the equities which would affect the bankrupt if he were asserting his rights and interests in the property. But that principle can only operate on the title as it stood when the property passed from the bankrupt to the assignee, and not to any rights attempted to be obtained subsequently.

By the laws of Maine a lien is given for personal services in cutting, hauling, or driving logs or lumber, which shall take precedence of all other claims, except liens reserved to the States of Maine and Massachusetts. Such liens would override the rights acquired by Hayford, by force of the assignment of the permits, so far as such liens existed in full force at the time of filing the petition. I am of opinion that Hayford, by virtue of the interest he held in the lumber under the permits, had a right to advance money for the discharge of such liens, and that the amount actually paid and applied in discharge of them he may claim out of the proceeds of the lumber as against the assignee. The case is similar to a second mortgagee, who should pay off a prior mortgage, or discharge a tax which was

a lien on the mortgaged estate—as against an assignee in bankruptcy the amount so paid, in protection of his title to the estate, would be an equitable claim on the estate, and it would pass to the assignee burdened with such equities.

It is claimed that a portion of the amount advanced by Hayford was applied to getting the logs to market, and that thereby their value has been increased to that extent; that at the commencement of the proceedings in bankruptcy, the logs were in the streams, or on the banks, and that it was necessary that they should be driven to market; that a large portion of the advances were applied to this purpose, and that it is inequitable and unjust for the assignee to take possession of the logs at the boom, where they were worth a much larger sum than they were when on the banks and in the streams, this increase in value being occasioned by the expenditure of the money so furnished by Hayford. Considering Hayford's relation to the property by the transfer of the permits, and the peculiar character of the property itself—its necessary diminution in value by being allowed to remain back in the woods—that some expenditures were actually necessary for preserving the property—and that without doubt the estate of the bankrupt has derived a substantial benefit from the expenditure, I feel justified in deciding that Hayford is entitled to an equitable lien on the timber for such sum as was actually, fairly, and judiciously expended in the care of, and in driving the lumber to the boom, after February 5th.

Pearson, having on the 10th of April agreed with Hayford that he would pay his demands against Gregg on or before July 5th, and that the permits should be assigned to him, on the 11th of April advanced to Gregg, by his note, one thousand five hundred and sixty-five dollars, and on the 13th of May, a further advance of one thousand five hundred dollars. These advances were made to Gregg by Pearson to enable him to pay his men and do the driving of the logs. At this time Pearson had no legal interest in the timber, the permits not having been assigned to him; but as he had agreed previously to take the permits and pay Hayford his claim, and Hayford

had agreed to assign the permits to him, adopting the rule that what is agreed to be done, may in equity be considered as done, he, Pearson, may be considered as holding the permits, and his advances will stand on the same ground and in like condition with those made by Hayford. Sixty-three dollars is charged as paid by Pearson to Blake for boots purchased by Gregg. I do not consider this to have been a lien claim on the evidence reported. It should not be allowed.

The case, as presented in the report, does not state with sufficient exactness the amount of lien claims discharged from the sums advanced by Hayford and Pearson; nor the amount actually paid, from the sums advanced by them, for driving the logs to market, and must be recommitted to the Register for a more full and detailed report on these points; the burden being on Pearson to establish such payment to the satisfaction of the Register.

Second. In addition to the timber cut under the permits, the bankrupt cut, the same winter, a quantity of logs from land in the town of Amity. The legal title to this land was in James White, who in October, 1863, made a contract with the bankrupt and one Brown to sell them one thousand eight hundred acres of the land, they giving him four notes of six hundred and seventy-five dollars each, payable in one, two, three, and four years, with interest annually. October 23d, 1864, the first note was paid, and three hundred and sixty-two dollars and eighteen cents was paid on the second note. At the time the notes were given, White gave the signers a bond to convey the land to them, on payment of their notes, according to their tenor. In the winter of 1867–68, Gregg having acquired all of Brown's interest, went on to the land and cut a quantity of logs, which were afterwards claimed by White as his property; and he had them scaled and marked. June 18th, 1868, White met Gregg and told him he wanted the money due on the notes, and Gregg replied he had nothing to pay with. The same evening Hayford came to White, and inquired about his claim on the logs, and he told him he considered them his, as they had been cut without his permission. Hayford informed

him he had been furnishing supplies to Gregg, and that he wanted to secure himself. After some conversation, White proposed to give Hayford a deed of the land, and relinquish his claim on the logs for the sum of two thousand three hundred dollars, which was about fifty dollars more than the amount due on Gregg and Brown's notes; the next day the proposition was accepted by Hayford and the papers executed; and Hayford subsequently sold the logs for three thousand one hundred and nine dollars.

The assignee claims that this amount, after the deduction of the two thousand three hundred dollars paid by Hayford to White, should be applied in reduction of his claim against Gregg, and that before Pearson, as Hayford's assignee, can insist on payment of the balance of Hayford's claim, he must procure from Hayford a conveyance of the interest he acquired in the Amity lands, by virtue of White's deed.

Whether this claim of the assignee is valid or not, I think, depends on the question whether, as between White and Gregg, the latter had any rights to the Amity lands which he could enforce against White. The terms of the bond had not been complied with by Gregg and Brown. There was a large amount of the purchase-money which was due and unpaid, and it had so remained for years. It should appear that White had so conducted and dealt with Gregg, that he had waived this breach, or else Gregg had no interest in the tract or lumber he cut therefrom.

The testimony on this point is not as full as could be desired, or as can probably be obtained. White's deposition does not meet this question of waiver, although he does say he called for payment of the notes in June, 1868. I shall allow either party to take further testimony on this point, and will reserve my opinion until the matter is again presented.

Ordered: That the report of the Register in this cause be recommitted to him, with directions to ascertain and report: 1st. The lien claims on the timber cut under the permits, which were discharged by the sums advanced to Gregg by

Pearson, or by the notes and cash advanced by Hayford, March 21, 1868, stating each of said claims, its nature, amount, and when paid and to whom. 2d. The amount paid from such advances after February 5th, 1868, for getting the logs to market, and to whom paid, and when; and whether such payments were judiciously made, and the value of the logs thereby increased to the amount so expended. 3d. The Register will take such further testimony as either party may request, touching the Amity lands, and Gregg's interest therein, and especially touching any waiver by White of the breach by Gregg and Brown of the condition of the bond given by White for the conveyance of said lands.

W. C. Crosby, assignee, appeared for himself.

Peters & Wilson, appeared for bankrupt and Hayford.

Rowe & Appleton, appeared for Pearson.

UNITED STATES DISTRICT COURT—OREGON.

Insolvent firm made a general assignment for the benefit of all creditors, and F., their assignee, proceeded to dispose of the property. On petition of creditors, the firm was adjudicated bankrupt in having committed an act of bankruptcy by making such assignment. The assignee in bankruptcy brought action against F. to recover the balance in his hands.

Held, the case is one of mutual credits between the bankrupts and F., and he is entitled to compensation for his services rendered in the premises, and may set off the amount allowed therefor against the claim of the assignee in bankruptcy.

He is entitled to the set-off notwithstanding proof of his claim therefor against the estate had been stricken out in proceedings before the Register, as not being a provable debt.

In re CATLIN, *Assignee of* RANDALL & SUNDERLAND, *v.* JOHN R. FOSTER.

DEADY, J.—This action was commenced July 26, 1869. The complaint states, that on January 30, 1869, proceedings were commenced in this court wherein said Randall & Sunderland were duly adjudged bankrupts, and that plaintiff is the assignee of their estate; and that the defendant, from January 9th to the 30th aforesaid, had the possession of all the goods and

chattels of said bankrupts, and that during said period said defendant sold and disposed of parcels of said goods and received sums of money due said bankrupts, in all to the amount of one thousand five hundred and twenty-five dollars and seventy-four cents in gold coin, and paid out of said moneys, on account of said bankrupts, the sum of nine hundred and twenty-six dollars and ninety-nine cents, retaining in his possession five hundred and ninety-seven dollars and seventy-four cents of said moneys; and that afterward, on July 7th, 1869, the plaintiff, as assignee as aforesaid, demanded the same of the defendant, and that the defendant refused to deliver said moneys, or any part thereof, to the plaintiff, and still detains the same. Wherefore the plaintiff prays judgment for the delivery of said money, with interest in coin, for the use thereof, at the rate of ten per centum per annum since April 9, 1869.

The answer of the defendant admits the allegations in the complaint, except that it denies that the defendant received any greater sum than one thousand five hundred and fourteen dollars and seventy-three cents, and avers that he paid out nine hundred and seventy-nine dollars and forty-nine cents, and denies that he retained or still retains any greater sum than five hundred and thirty-five dollars and twenty-four cents, received by him for goods sold or debts collected belonging to said bankrupts.

The answer also contains two counter claims which the defendant offers to set-off against the demand of the plaintiff. The first for the sum of two hundred and fifty dollars, which the defendant's attorneys demand of him for legal services rendered the defendant while conducting and settling the business of Randall & Sunderland. The second is also for the sum of two hundred and fifty dollars for and on account of the services of defendant in and about the management of the business of said Randall & Sunderland.

On motion, the first of these counter claims was stricken out, as it did not appear that the defendant had ever paid the amount to the attorneys, but only that they *claimed* that he was liable for it.

To the second claim the plaintiff replied, denying knowledge of defendant's services and that they were worth two hundred and fifty dollars.

Also, that on January 9th, 1869, Randall & Sunderland made an assignment to the defendant of all their goods and effects, under which assignment the defendant took possession of all the property of said bankrupts; that said assignment was made in fraud of the Bankrupt Act, and was the act of bankruptcy upon which said Randall & Sunderland were adjudged bankrupts; and that defendant colluded and conspired with said bankrupts in said fraudulent act, and in fraud of the Bankrupt Act managed the business of the bankrupts until enjoined therefrom by the proceedings in bankruptcy on January 30th, 1869.

Also, that on April 1st, 1869, the defendant filed a claim against the estate of the bankrupts for the same services; that afterwards certain creditors of said estate filed objections to said claim, and such proceedings were had thereupon before the Register on default of the defendant: that an order of this court was made expunging said claim from the lists of claims upon the assignees' record, which order still remains in full force.

In pursuance of the stipulation of the parties, the cause was tried without the intervention of a jury on January 25th, and reserved for decision.

On the trial the defendant was called as a witness by the plaintiff. The only other evidence introduced was the assignment and the papers and proceedings in the bankruptcy case.

The evidence of the defendant supported his answer as to the amount of money received and paid out by him on account of the bankrupts, during his possession of the goods, and as nothing was shown or appears to the contrary, the fact must be found accordingly.

Of the money so paid out, as it appears from the account stated by the defendant, which is a part of his testimony, there was paid to Sunderland, one of the bankrupts, on January 30th,

the sums of thirty-one dollars and fifty cents and twenty-one dollars. On account of these payments being made to the bankrupt, the plaintiff objects to their being treated and considered as payments on account of the estate.

According to the testimony of the defendant the payments were made under these circumstances. The business of the bankrupts consisted of a retail boot and shoe shop, and some manufacturing up-stairs, with a stock of about fourteen thousand dollars. The defendant had the general superintendence of the business, and employed Sunderland to oversee the manufacturing at seventy-five dollars per month. Paid him sums on tag from time to time, amounting in all to the sum of the two payments, which were afterwards charged on January 30th, and that such wages were less than a person not interested could be obtained for.

The *fact* of the payments, is, in effect, denied in the pleadings, but on the trial the objection insisted upon was the illegality of paying money to one of the bankrupts. But I do not perceive that the employment of Sunderland on fair terms to do what was necessary and convenient to be done about the business, is in any way contrary to law or good morals. Indeed, I suppose the defendant might have returned, at any time prior to the injunction, to R. & S., all the property he received from them under the void assignment. Much more, it seems to me, might he pay S. reasonable wages for work and labor performed about the business and property while under his charge. In any view of the matter, the defendant is only liable to the plaintiff for what came into his hands from or through the bankrupts, and was not returned to them or their representative—the assignee in bankruptcy. The question is, was the payment or delivery of the fifty-two dollars and fifty cents actually made to S. prior to the service of the injunction upon the defendant on January 30th, or not. If made after the service of the injunction—being in such case made in violation of it—I suppose it would be wrongful, and the defendant would still be liable for the amount.

But, as has been suggested, the fact of the payments having

been made as alleged, was not seriously contested on the trial. The testimony of the defendant is direct and positive to that effect, and it must be considered proven. This shows that the defendant has only five hundred and thirty-two dollars and twenty-four cents in his hands belonging to the estate of R. & S.

Is he entitled to set off his claim for services against a like amount of this sum?

The plaintiff's objection to the allowance of this set-off has been stated in his replication. From the evidence it appears that the defendant went into possession and control of the goods and business of R. & S. on January 10th, 1869, under an assignment to himself, which was afterwards, namely, on February 27th, adjudged void by this court, as being a fraud upon the Bankrupt Act, and an act of bankruptcy, and that he continued in such possession and control and managed and conducted said property and business, under said assignment, until enjoined by this court, on January 30th, thereafter.

As to the alleged conspiracy and collusion between the defendant and R. & S., there is no direct proof. But from the circumstances shown the inference is reasonable that the defendant accepted the assignment and went into possession under it with a knowledge of the facts—which in contemplation of law made such assignment fraudulent and an act of bankruptcy—namely, that R. & S. were insolvent, and were by that means attempting to dispose of their property with intent to defeat and delay the operation of the Bankrupt Act.

On account of this knowledge the plaintiff claims that the defendant is not entitled to anything for his services under this illegal assignment; and that if he is, he should be required to prove his debt and take his *pro rata* with the other creditors, and not receive his pay in full by being allowed it as a set-off against the money of the estate in his hands.

The questions made by the objection of the plaintiff are not free from doubt.

By Section 20 of the Bankrupt Act it is provided:—"That in *all cases* of *mutual debts* or *mutual credits* between

the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate; *provided*, that no set-off shall be allowed in favor of any debtor to the bankrupt, of a claim purchased by or transferred to him after the filing of the petition."

This is the only provision in the Bankrupt Act touching the subject of set-off, and it is substantially the same as that contained in 6 G. IV., C. 16, Section 50; but the English act further provides that such set-off may be made, "notwithstanding any prior act of bankruptcy committed by the bankrupt before the credit given or debt contracted by him. * * * *Provided*, that the person claiming the benefit of such set-off had not, when such credit was given, *notice of an act of bankruptcy by such bankrupt committed*."

But for this proviso, it seems to have been holden in the English courts, that a debtor to a bankrupt could only be called upon to pay the balance after deducting what the bankrupt owed him, whether the credit was given to such bankrupt after notice of an act of bankruptcy committed by him or not. (1 Bac. Ab., 647.)

This proviso not being in our act, nor any equivalent of it in legal effect, I conclude upon this authority, and, indeed, upon general principles, that although the defendant had notice of the act of bankruptcy committed by R. & S., when he rendered the service, he is entitled to set off the value of the same against what he owes them or their assignee, *provided*, the transaction amounts to a case of mutual credit between the parties, and the defendant's "claim in its nature is provable against the estate."

The term *mutual credits* in the Bankrupt Act is more comprehensive than the term mutual debts in the statutes set-off. The term *credit* is synonymous with *trust*, and the trust or credit need not be of money on both sides, but if one party entrusts the other with *goods or value*, it will be a case of mutual credit. 7 Bac. Ab., 170.

By Section 42 of the Bankrupt Act of April 4, 1800, when a mutual credit was given before a party became bankrupt, a set-off was allowed between the parties. Under this act it was decided that where the acceptor of a bill of exchange paid it after bankruptcy of the drawer, he might set off the amount of the same in an action by the assignee of the drawer for the value of certain goods consigned to the acceptor after the acceptance, and by him converted into money before the bankruptcy. This was held to be a case of mutual credit *before* the bankruptcy, although the defendant did not pay debt set off until after the bankruptcy; and although under that act the debts for that reason could not have been proved against the estate. Wash. C. C. R., 178.

In the case of *Rose* v. *Hart*, 8 Taun., 499; cited 7 Bac. Ab., 650, it was ruled that where cloth was deposited with a fuller to dress by a party who afterwards became bankrupt, that there was a case of mutual credit to the value of the services for dressing the cloth, but not for a general balance due from the bankrupt; and in that case the general rule was laid down that the *credits* intended by the act were only such "as must in their very nature terminate in cross debts; as where a debt is due from one party and credit given by him on the other, for a sum of money payable at a future day, and which will then become a debt; or when there is a debt on one side and a delivery of property, with directions to turn it into money, on the other; but where there is a mere deposit of property, without authority to turn it into money, no debt can ever arise out of it, and, therefore, it is not a credit within the meaning of the statute."

Within the rule laid down by these authorities, there can be no doubt but that this was a case of mutual credit—at least to the value of the defendant's services. The defendant received the goods and accounts, and undertook in the course of the business to convert them into money. His skill and labor, in this respect, have some value. R. & S. credited—*trusted*—him with the property and with the money he might realize from it, and the defendant credited them for his services—yet to be ren-

dered. Therefore the credits were mutual—and were also such credits as must result in cross debts.

The debt of the defendant is also provable under the act. Section 9 provides: "That all debts due and payable from the bankrupt, at *the time of the adjudication in bankruptcy*, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest was payable by the terms of the contract, may be proved against the estate of the bankrupt."

In the case under consideration, the adjudication was made on February 27, and on January 30 the debt due the defendant for his services was both due and payable; and if it had then only existed, but been payable at a future day, it would still have been provable.

What is the value of the services? In his answer, the defendant claims that they are worth two hundred and fifty dollars in coin. On April 1, 1869, he swore to the proof of debt before the Register for these same services, in which he stated that R. & S. were justly indebted to him on that account "in the sum of one hundred and twenty-five dollars * * * for labor and services * * from January 9, 1869, to January 30, at the rate of two hundred dollars per month in legal tender." At that time one hundred and twenty-five dollars in currency was about equal to one hundred dollars in coin. On the trial, the defendant being asked by his counsel if two hundred and fifty dollars in coin was a reasonable compensation for his services, did not answer yea or nay, but said, "*I don't think it very extravagant.*"

The service was a general superintendence of a retail boot and shoe shop for twenty days, with the assistance of Sunderland, one of the former proprietors and assignors.

I think five dollars per day in coin a fair compensation. That is what the defendant estimated the value of his services at, in proof of debt before the Register last April, and no reason is shown for the increase of one hundred and fifty per centum since that time.

Allowing the defendant a set-off of one hundred dollars in

coin, and deducting that sum from the debt due the plaintiff, leaves the sum of four hundred and twenty-three dollars and twenty-four cents. Add to this interest on the same since July 7—seven months—makes four hundred and fifty-eight dollars and eighty-eight cents, which is the sum due the plaintiff, in coin.

But the plaintiff also objects to the allowance of this set-off, on the ground of an adverse prior adjudication as set forth in his replication.

The facts concerning the matter are these: On April 1, 1869, the defendant proved a debt for these services of the sum of one hundred and twenty-five dollars in legal tender. On objection by some of the creditors, and a motion to expunge the claim from the list of proven debts, the matter was referred by the court to the Register. In the meantime, it may be presumed that the defendant, acting upon the advice of his counsel, concluded not to press his claim to payment by the assignee, but to rely upon having it allowed in full as a set-off against the sum then in his hands belonging to the estate; at least he did not appear before the Register, but allowed the matter to go by default. Thereupon the Register reported as a conclusion of fact that said claim was for services rendered under a fraudulent and void deed of assignment to the defendant, and as a conclusion of law that it ought not to be allowed.

Upon motion, and without argument, there being no opposition, on August 16, this court confirmed this report, and made an order expunging the claim from the list of debts. There the matter rested until the plaintiff brought this action, when the defendant pleaded the claim as a set-off.

Before proceeding to consider whether that order amounts to a final *judgment* against the claim of the defendant, it is proper to state that the conclusion of the Register against the legality of the claim was predicated upon the case of ——— v. *Yates*, 4 Ed. Ch., cited in 5 Abb. Dig., 273, as deciding—That where a trust deed is pronounced void, as being contrary to law, the trustee cannot be allowed any compensation for

services under it. Upon the strength of this authority, this court made the order of August 16, rejecting the claim. I now think that order was erroneous, and upon examination of the original report of the case of ——— v. *Yates*, I find that it does not decide any such thing as stated in the digest.

These services were rendered by the defendant at the request of R. & S., before the petition filed in bankruptcy, and unless there is some established rule of law or positive statute prohibiting the payment or allowance of such a claim, I cannot now see upon what ground the right to have it allowed as a set-off is to be denied. If the defendant had notice of the act of bankruptcy—*as I presume he had*—under the Bankrupt Act of 6 Geo. IV., the claim could neither have been proved against the estate, or allowed as a set-off in an action by the assignee; but there is no such provision in the American act, and the court must administer the law as it finds it.

I have come to the conclusion, that the order rejecting the claim of the defendant is not such an adjudication as prevents the defendant from pleading it as a set-off in this action. The provisions of the Bankrupt Act bearing upon the question are substantially as follows:

Section 22 provides for each creditor's making proof of his debt, and presenting the same to the assignee; it also gives the District Court power "to reject all claims not duly proved, or where the proof shows the claim to have been founded in fraud, illegality, or mistake." Section 8 gives the right of appeal from this District to the Circuit Court "to any supposed creditor whose claim is wholly or in part rejected." Section 24 enacts in effect that such supposed creditor, upon entering such appeal in the Circuit Court, shall file a pleading as plaintiff in an action at law, containing a statement of his claim, and thereafter the controversy shall proceed to determination as an ordinary action at law.

Taken together, these provisions of the act amount to this, and nothing more:

A creditor cannot demand payment of his debt until he makes and presents to the assignee the proper proof thereof.

This provision is analogous in purpose and proceeding to the probate of debts against the estate of a decedent, before being presented to or allowed by the administrator. When this is done, parties interested may object to the claim, and the court —the District Judge without a jury, in a summary manner— may reject the claim, as not being duly proved or as being founded in fraud, illegality, or mistake. Then and not before, the supposed creditor may bring action in the Circuit Court against the assignee, and have his right to payment regularly tried. But this action can only be maintained by the creditor's first taking an appeal from the order rejecting his claim. This appeal must be taken within a limited time, in a particular manner, and to a particular court. The right to sue the assignee is postponed and limited to the happening and performance of these precedent circumstances and conditions. But they are not adjudications, but only proceedings preliminary to adjudication. But suppose the assignee to bring an action upon a demand due the bankrupt, cannot the defendant plead a set-off to more or less of such demand, although the same has not been proved and presented to the assignee, and rejected by the judge, and appeal taken to the Circuit Court. It seems to me that he can. The cross demand of the defendant in such case is proved on the trial, or it will not be allowed.

The case cited above from 1 Wash. C. C. R. is an instance in point, where a party was entitled under the Bankrupt Act of 1800 to be allowed a claim as a set-off, which for a technical reason he could not have maintained an action to recover.

In this case the defendant not having brought his action in the Circuit Court within the term prescribed after the rejection of his claim, has lost his right to maintain a suit upon it; but notwithstanding this, I think the better conclusion is that he may still plead it as a set-off by way of defense to an action by the assignee. On the other hand it may be said that a party who elects to prove and obtain his demand in the mode prescribed in Sections 22, 24, and 8, must pursue that mode to the end, and if he fails or neglects to do so, cannot afterwards have the same demand allowed as a set-off. Not that the or-

der of rejection is an adjudication between the parties in any proper sense of that term, but that the party having elected to obtain his demand in that way is precluded from litigating it in any other. There is force in this argument. On this point I am not confident that my conclusion is the proper one, and the question may be considered an open one in this court, if parties wish to be heard upon it in any case that may arise hereafter.

The set-off of the defendant to the amount of one hundred dollars in coin will be allowed, and the plaintiff must have judgment for four hundred and fifty-eight dollars and eighty-eight cents in coin, with costs and expenses of the action.

Freidenrich, for plaintiff.

Logan, for defendant.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where a member of a bankrupt firm had failed to file schedule of his personal property,
***Held*, the other members would not, on that account, be refused a discharge.**

In re DEMETRIUS G. SCOFIELD, SAMUEL L. SCOFIELD, & JOHN M. MOORHEAD.

BLATCHFORD, J.—In this case the discharge of the two Scofields opposed by the receiver of the Croton National Bank as a creditor. The bankrupts composed the firm of D. G. Scofield & Co.

The first specification charges willful false swearing by the Scofields, in making oath that the schedules and inventory filed with their petition, state fully and truly their debts and estate, and those of said firm; whereas: 1st. The firm of W. H. and F. B. Taylor, who are in such schedules asserted to be creditors of said firm for the sum of twelve thousand three hundred and fifty dollars and eighty-three cents, are not its creditors for any sum, but are indebted to it or to D. G. Scofield, in the sum of eighty thousand dollars, or in a considera-

ble sum of money, no part whereof is included among the assets of said firm or of either of said bankrupts, as stated in said schedules. 2d. H. N. Tibbits, who is asserted in said schedules to be a creditor of said firm for the sum of twenty-five thousand dollars, is not its creditor for any sum. 3d. The bankrupts, or said firm, or D. G. Scofield individually, owned at the time of the filing of the petition certain real estate known as the Cunningham mill property, situated at the southeasterly corner of First avenue and Twenty-ninth street, in the city of New York, and four lots of land situated at the southwest corner of First avenue and Twenty-seventh street in said city, which two parcels of property falsely and fraudulently stand in the name of William H. Taylor. 4th. D. G. Scofield was at the time of the filing of the petition the owner of a valuable horse now or lately in the possession of said Taylor, or his said firm, and of a certain library, certain furniture, and other personal property.

The second specification alleges that the bankrupts have concealed a claim for an undisputed account against said Taylor or his said firm, arising from the sale of certain securities formerly given to said Taylor or his said firm, by the bankrupts or one of them, or their said firm, and also arising from the said real estate, which passed into the hands of said Taylor, from D. G. Scofield, with intent to defraud his creditors and those of his said firm, and for which Taylor or his said firm is under obligation to account to the creditors of D. G. Scofield or of his said firm, and also a horse, a library, and certain furniture, and other personal property.

The third specification alleges that each of the bankrupts has been guilty of negligence and fraud in omitting to deliver the said property to the assignee herein.

The fourth specification alleges that since the passage of the Bankruptcy Act, the bankrupts have altered their ledger A and their cash-book A, and other books of their said firm, and falsified the same by introducing therein entries showing large amounts of money from W. H. & F. B. Taylor, which were never so borrowed, and in other ways; a portion of said false

and fraudulent entries being found on pages 25 and 26 of said ledger, and on pages 1 to 49, inclusive, of said cash-book, and others in said books.

The fifth specification alleges that the bankrupts have made or been privy to making false and fraudulent entries in their books of account or those of their said firm, being the entries specified in the fourth specification, and others, with intent to defraud their creditors.

The sixth specification alleges that since the passage of the Bankruptcy Act, D. G. Scofield has removed or caused to be removed from this district a portion of his property, to wit, a valuable horse and other property, with intent to defraud his creditors.

The seventh specification alleges that the bankrupts have, in contemplation of becoming bankrupt, made certain pledges, payments, transfers, assignments, or conveyances of certain portions of their property, directly or indirectly, absolutely or conditionally, for the purpose of preferring a certain creditor or person or persons having a claim against them, or for the purpose of preventing the property from coming into the hands of the assignee or of being distributed under the act, to wit, certain gold checks and large sums of money amounting in the aggregate to seventy-five thousand dollars or thereabouts, paid by the bankrupts to said Taylor or his said firm, the whole or a portion of which moneys the bankrupts, in collusion with said Taylor, fraudulently obtained from the Croton National Bank; and the said real estate, and certain horses, carriages, furniture, etc., which were for said fraudulent purposes mortgaged to said Taylor about 10th March, 1866, and the proceeds whereof said Taylor has received.

The eighth specification alleges that the firm of D. G. Scofield & Co. ought not to be discharged from its debts and liabilities, because the bankrupt Moorhead has not made or filed any schedule of debts, or inventory of effects, as required by the act, and has not delivered his property or any portion thereof into the hands of the assignee.

The firm of D. G. Scofield & Co. was formed about Feb-

ruary 1st, 1866, and did business as brokers and speculators generally in stocks and gold. The firm kept its bank account in the Croton National Bank, which bank was in the habit of loaning to it daily large sums of money without taking any security, by allowing it to overdraw its account during the day, provided the deficiency was made good by the close of the day. On the 4th of April, 1866, the firm thus overdrew the sum of sixty-three thousand dollars, failed to replace it, and suspended payment. During its continuance in business, the firm did business as brokers in buying and selling gold for W. H. & F. B. Taylor, and borrowed large sums of money from W. H. & F. B. Taylor. On the 3d of April, 1866, W. H. Taylor gave to the bankrupt's firm an order to purchase for W. H. & F. B. Taylor, from fifty thousand to seventy-five thousand dollars of gold, and such firm purchased about seventy thousand dollars of gold, deliverable and to be paid for the next day. During the 4th of April, about fifty thousand dollars of the gold so purchased was delivered by the sellers of it to the bankrupt's firm. That firm paid for it by checks on the Croton National Bank, and delivered it to W. H. Taylor, and charged it to his said firm in account. The bankrupt's firm also delivered to W. H. & F. B. Taylor, on the 4th of April, currency checks to the amount of twenty-four thousand dollars, and charged the same to that firm in account.

The foregoing facts are not disputed. The contest is as to whether the bankrupt's firm were indebted to W. H. & F. B. Taylor to an amount equal to the amount of the gold and checks so put into the hands of W. H. & F. B. Taylor. The creditor alleges that such indebtedness did not exist, but that the transaction was a scheme of fraud to put into the hands of W. H. & F. B. Taylor, the gold and checks in question in trust for the benefit of the bankrupt's firm, and for the purpose of defrauding their creditors. The bankrupts claim that on the morning of April 4th, at the commencement of business, their firm was indebted to W. H. & F. B. Taylor for borrowed money in the sum of nearly one hundred thousand dollars. The Taylors had in their hands a large amount of

stocks which they had received from the bankrupt's firm, and those stocks were returned by the Taylors to the bankrupt's firm on the 4th of April, after the Taylors had received the gold and checks in question. Those stocks were largely petroleum stocks. Such petroleum stocks were declining rapidly in selling value on and just before the 4th of April, and have since turned out to be almost wholly worthless. What became of the stocks so returned by the Taylors is fully shown by the evidence.

From a careful examination of the testimony I am satisfied that the creditor has failed to establish his claim that the gold and checks given to the Taylors on the 4th of April, were not given on account of *bona fide* indebtedness due by the bankrupt firm to the Taylors' firm at the time, or his claim that W. H. Taylor or his firm constituted a part of the copartnership of the bankrupts' firm, or that the amount alleged in the schedules of the bankrupts to be still due by their firm to W. H. & F. B. Taylor, is not due. The integrity of the entries found in the books of account of the bankrupts' firm as to their transactions with the Taylors' firm, is not successfully impeached. Those entries show that after charging against the Taylors' firm the gold and the checks in question, and all other items that ought to be so charged, the amount of indebtedness stated in such schedules still remains due to the Taylors' firm. Whether the debt to the Croton National Bank was created by fraud or will be discharged by a discharge granted herein, is not the question. The question is, whether the property turned over to the Taylors by the bankrupts went to apply on a *bona fide* debt due by the bankrupts' firm to the Taylors. I think on the evidence that it did.

The indebtedness to Tibbets appears to be still outstanding. At all events no willful false swearing in respect thereto by the Scofields is shown.

The transactions in regard to the creation of such indebtedness were carried on by the bankrupt Moorhead to the exclusion of the Scofields, and in inserting in their schedules that indebtedness as still existing, the Scofields acted on informa-

tion derived from Moorhead, and which they had a right to believe to be true.

On the proofs the real estate and horse and library and furniture mentioned, did not belong to the bankrupts, or to either of them, when their petition was filed.

The bankrupts have not concealed any claim for an account against W. H. Taylor, or his firm, arising from the sale of any securities formerly given to said Taylor, or his firm, or from any real or personal property, nor have they been guilty of negligence or fraud in omitting to deliver any such property to the assignee.

It is not established that the bankrupts have altered or falsified their books of account in any manner, or made, or been privy to making any false or fraudulent entries in any of them.

There is no evidence that D. G. Scofield has removed or caused to be removed any property of his from this district.

The seventh specification, in so far as it purports to charge the existence at the time of the filing of the bankrupts' petition of property of theirs which they failed to dispose, is merely a repetition of preceding specifications. In so far as it charges the doing, in 1866, of the acts which it specifies, it alleges acts which were done before the passage of the Bankruptcy Act, and which are therefore not within the purview of the 29th Section of the act, as acts the doing of which authorizes the refusal of a discharge.

The eighth specification amounts to nothing. The firm of D. G. Scofield & Co. is not to be discharged. The Scofields are to be discharged. By Section 36 of the act a discharge is to be granted or refused to each of the Scofields as it would be if Moorhead were not a party to these proceedings.

The specifications are all of them overruled, and discharges are granted to Demetrius G. Scofield, and Samuel L. Scofield.

Aaron J. Vanderpoel and *J. Stanley Smith* for the bankrupts.

Elliott F. Shephard for the creditor.

UNITED STATES DISTRICT COURT—MAINE.

The Bankrupt Court will adjudge a bankrupt guilty of contempt of court who fails to pay over to his assignee money returned "cash on hand," in his schedule of assets, or to the marshal as messenger in involuntary cases. Bankrupt committed and ordered to be detained until he should pay the amount stated on his inventory, together with costs.

In re DRESSER.

Fox, J.—E. K. Dresser had been adjudged a bankrupt on the petition of his creditors, and a warrant had been issued to the marshal as messenger, requiring him to take possession of all the estate of the bankrupt, and ordering the bankrupt within ten days to deliver to the messenger a schedule of his creditors, and an inventory of his estate. The schedule and inventory were delivered to the marshal, and from the inventory it appeared that the debtor was possessed of one hundred and fifty-six dollars and fifty cents. This sum had been repeatedly demanded by the marshal, but the bankrupt had never paid over any part of it, at last excusing himself by claiming he had spent it in the support of his family.

C. P. Mattocks was chosen assignee of the bankrupt, and not having received this amount, he petitioned the court for an order to show cause why he had not paid over the money, and that he should be adjudged guilty of contempt of the court. This bankrupt was brought into court in Portland, before Judge Fox, and the court decreed that the bankrupt was guilty of contempt in not complying with the warrant of the court, and ordered that he should be committed to the jail in Portland, there to be detained until he should pay the amount stated on his inventory, together with the costs, or until the further order of the court. The bankrupt afterwards paid the amount.

This is the first case in which the District Court has been called upon to enforce a compliance with orders and decrees, although in many instances bankrupts have failed to comply with the orders of the court within the time prescribed. We

understand that hereafter, in all cases where the orders are not promptly complied with, they will be at once enforced by an arrest of the delinquent.

NEW YORK COMMON PLEAS—SPECIAL TERM.

Property which had been conveyed by a bankrupt in fraud of creditors prior to the passage of the Bankrupt Law, is to be regarded as vested in the assignee in bankruptcy, by force of that act, and by virtue of the proceedings thereunder.

The bankrupt, therefore, cannot be arrested in proceedings under the act of 1831, of this State, known as the "Stillwell Act," by a creditor seeking to reach the property of the bankrupt.

The primary object of civil proceedings under the Stillwell Act is, not the punishment of the debtor, but the collection of the creditor's judgment; and therefore such proceedings are in direct conflict with the Bankrupt Law, as respects all property which passed to the assignee in bankruptcy.

GOODWIN *v.* SHARKEY.

BARRETT, J.—Sharkey was arrested under a warrant issued by me on the 28th ult., pursuant to the provisions of the act of April 26th, 1831, commonly known as "the Stillwell Act." Upon being brought before me, he moved to quash the warrant, principally upon the ground that, before it was issued, he had applied for a discharge under the Bankrupt Law, had been thereupon adjudicated a bankrupt, and that his proceedings had progressed so far as the appointment of an assignee and the usual conveyance to that official of the estate of the bankrupt.

The acts complained of, and which constitute the foundation for the warrant, consist of the fraudulent disposition of real estate prior to the passage of the Bankrupt Law. It was claimed, on behalf of the complainant, that these proceedings under the act of 1831 should neither be dismissed nor suspended because of the Bankrupt Law or the proceedings thereunder, for the reason that the purpose of the State act is, as its title indicates, to punish the fraudulent debtor as well as to obtain, in a summary manner, the assignment of his property. I cannot assent to this proposition.

The punishment of the fraudulent debtor, contemplated by the act, consists in his conviction of a misdemeanor under Section 26. By that section, the fraudulent disposition of property, the very act complained of here, and which entitles the creditor, under the previous sections, to this warrant, is made criminal, and is punishable as such. The arrest under the warrant issued by the civil tribunal, is not for the direct purpose of punishing the fraudulent debtor. It is a civil proceeding in aid of the collection of the judgment. The act of arresting and imprisoning the debtor, may, of itself, be said to be a punishment. If so, that punishment is merely incidental, and is only the weapon whereby the direct purpose, which is the disclosure and assignment, in a fair and just manner, of the debtor's property, is compelled and enforced. And such is the purpose of the act, even where the proceedings are based upon a fraudulent disposition of property, which, by the debtor's own wrongful act, has passed beyond his control, and which he has thus become unable to effectually assign. The imprisonment and punishment consequent thereupon may, in that case, be the sole result of the proceedings; that is, the sole practical result; and yet, however protracted, they are still the means rather than the end. It is true that Section 11 refers to persons committed under the act, as remaining in custody in the same manner as "other prisoners in criminal processes;" yet it has been held that, notwithstanding this language, these proceedings are not criminal in their character, but a summary civil remedy to enforce the collection of a debt, and more analogous to those in chancery than in a court of law. (*Moak* v. *De Forrest*, 5 Hill, 605; *People* v. *Underwood*, 16 Wend., 546; *Spencer* v. *Hilton*, 10 Wend., 608.)

The question then arises, whether the property alleged to have been fraudulently disposed of, passed to the assignee in bankruptcy. If it did not, it is claimed that the complainant has a perfect right to proceed under any State laws which afford him the means of recovering the property, and of compelling its application to the payment of this judgment. If the property did pass to the assignee, then it is quite clear that the present

proceedings are in direct conflict with the Bankrupt Law, and cannot be maintained. I have stated that these proceedings cannot be sustained as a mere process for the punishment of the debtor, distinct from their legitimate end, which is the application of his property to the payment of the judgment. If, therefore, that property, or the right to recover it, be vested in the assignee in bankruptcy, for the equal benefit of all the creditors, it needs no argument to prove that no one creditor can, through the agency of State laws, obtain a preference over other creditors, or the application of any part of the bankrupt's property for his exclusive benefit. Indeed, a Pennsylvania act very similar to this of 1831, was lately held to be completely superseded by the Bankrupt Law; and, for the very reason that such a preference was in direct conflict with the law, and would, of itself, constitute an act of bankruptcy, proceedings under the State act were quashed. (*Commonwealth* v. *O'Hara*, 1 N. B. R., 86; *Eames*, 2 Story, 322; *Sturges* v. *Crowninshield*, 4 Wheat., 122; *Griswold* v. *Pratt*, 9 Met., 16.) Now, it is well settled by our court of last resort, that such a preference and exclusive application of the debtor's property are the results of a successful complaint under the act of 1831. (*Spear* v. *Wardell*, 1 N. Y., 1 Comst., 144; *Hall* v. *Kellogg*, 12 N. Y., 2 Kern., 325.) This brings us directly to the point at issue, and it seems to me that Section 14 of the Bankrupt Law itself is decisive of it. That section explicitly provides that "all the property conveyed by the bankrupt in fraud of his creditors * * * shall, in virtue of the adjudication in bankruptcy and the appointment of his assignee, be at once vested in such assignee." It is claimed that this provision can only have reference to fraudulent conveyances made after the passage of the act. But this proposition is based upon the argument, which I think fallacious, that the fraudulent conveyance is made illegal by the Bankrupt Act itself, and that thus, by the opposite construction, the law becomes *ex post facto*.

The true construction of the provision, in my judgment, is, that it places the assignee in the shoes of the creditors as well as of the bankrupt.

This provision was not contained in the Bankrupt Act of 1841, and it was held that, under that act, nothing passed to the assignee save those legal and equitable rights which the bankrupt could himself enforce. (*Reaves* v. *Garner*, 12 Ala., 661.) That was one of the glaring defects of that act, and it was undoubtedly with the view of curing it that this provision was inserted in the present act. If, then, these conveyances, however old, were fraudulent against the creditors of the bankrupt under any law, whether common or statute, whether under the laws of the United States or of this State, they are equally fraudulent as against the assignee in bankruptcy.

The conveyances are not made illegal by the Bankrupt Law; but, by its force, and by virtue of the proceedings taken under it, the assignee represents and has become a trustee for all the creditors of the bankrupt as well as for the bankrupt himself, and is vested with every right which was possessed either by the bankrupt or the creditors in respect to fraudulent conveyances.

It follows, from these views, that the motion to quash the writ must be granted and the prisoner discharged.

John E. Burrill and *Messrs. King & Lathrop*, for the prisoner.

William Fullerton, *A. J. Vanderpoel*, and *C. A. Arthur*, for the creditor.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

The petition of the bankrupt was filed May 19, 1868. In January of that year he conveyed two parcels of land, and a fractional share in three several schooners, to his wife.

Held, that the conveyances were made after his insolvency became known to him, that he thereby committed a fraud upon the act, and that his discharge must be refused.

In re REUBEN A. ADAMS.

LOWELL, J.—The proceedings in bankruptcy were begun by the voluntary petition of the debtor, May 19, 1868. In January of that year, he conveyed two parcels of land at Province-

town, and a fractional share in three several schooners, to his wife, Caroline M. Adams. The bankrupt has carried on for many years a rather peculiar kind of business, which he called a general auction and commission business, and which consisted of buying goods at wholesale and sending them to various country towns, large and small, to be disposed of by his travelling agents by auction. He usually called in his accounts and made an examination of the state of his affairs in January of each year; but he swears he did not do so in the year of his failure until the report of his insolvency had been spread abroad, and his creditors had become alarmed and attached his property, which was in the month of May, and that when he then called upon his agents for their returns, he found to his surprise that his creditors were right, and that he was deeply insolvent. He explains the transfers to his wife by saying that she owned a large estate which he had tried and intended to keep separate from his own, and that by some mistake this property was put into his name, though in equity and justice it was always hers.

The time chosen for the conveyances he accounts for by its being January, which he says is settling time, and that he wanted to know how he stood, as he was about to change the nature of his business.

The evidence shows that in 1855, Adams settled upon his wife all his interest in his father's estate, and there is nothing to impeach this transaction, which was done under the advice of counsel. But the indenture of trust contained a power to Adams and his wife to revoke the uses, which they did in the following year; and since that time the title of the wife must depend upon the general law of Massachusetts regulating the property of married women. Some of the shares of bank stock, and perhaps other evidences of property, have always remained in Mrs. Adams' name, and I do not see that the present creditors of her husband can lay any claim to these, it not appearing that the transfer was illegal or fraudulent when it was made. But it is otherwise with the property conveyed by the husband to the wife in January, 1868. Whatever may have been the

supposed equitable right of the wife to this property as against her husband, there was nothing, so far as appears, to mark it as hers, or even to show that any specific money or estate of hers had been used to buy it. There was no trust, express or implied, impressed upon it, and it was part of his apparent capital. The transfers, therefore, must be examined upon their merits as gifts from the husband to the wife at that time, and the case has very properly been so argued on both sides. As such they cannot be sustained. In arriving at this conclusion it is not necessary to inquire into any doubtful or contested points of law. Granting that a *bona fide* settlement upon a wife will be upheld, excepting when the husband is actually insolvent at the time—which is a good deal more than has ever been decided in Massachusetts—still it is clear that Adams was insolvent when these transfers were made. This is not denied. But it may be said that he was not aware of his situation, and therefore ought not to suffer by a refusal of his certificate, though the assignee should be entitled, upon the facts as they now appear, to avoid the transaction, as a technical fraud upon the creditors. If the bankrupt and his wife had surrendered this property as soon as the mistake was discovered, the case would stand very differently; but as he has not done so, nor made any attempt to repair his error, I find it the more difficult to believe that it was a mere mistake. His conduct since his admitted insolvency, and the character of his answers to the interrogations propounded to him in his examination, the great improbability of his story, the short time before his actual failure, all go to show that the conveyance was made after, and not before his suspicions of his solvency had been aroused. There cannot be a doubt that he has committed a fraud on the act, and that he ought to have known the state of his affairs, and he has failed to show to my satisfaction that he did not know it. Whether, if he had persuaded me that he simply made the deeds without inquiry, or even with good reason to suppose himself solvent, he could still be discharged, unless he made restitution, I need not decide; nor need I inquire whether he kept proper books of account, nor whether the loss of his books is chargeable to

him, because upon the main and most important part of the case I decide that the discharge must be refused.

J. D. Ball for the creditors.

E. Avery for the bankrupt.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

It is no ground of objection to the discharge of the bankrupt that he caused and permitted the loss, waste, and destruction of his estate and effects, and misspent and misused the same, unless such loss, etc., occurred after the filing of the petition.

A bankrupt who has sold one carriage, one sleigh, two pairs of horses, one piano, one harness, and a part of a lot of cigars, but without ever having formed a deliberate purpose of buying goods to sell again in order to raise money, is not thereby made a merchant or tradesman within the meaning of the law, and a failure to keep proper books of account will not prevent his discharge.

The buying of goods fraudulently, or when the debtor knew that he could not pay for them, is not a fraud which will prevent the discharge of a bankrupt.

In re W. M. Rogers.

Lowell, J.—The evidence relied on in support of the objections to the bankrupt's discharge is found in his examination in the cause, and this shows a reckless waste and extravagance in expenditure and a disregard of the just rights of creditors. The bankrupt appears to be a salesman or drummer for a manufacturer, with a fair salary; and within six or seven months of the date of his petition, he had run in debt for horses and carriages, and borrowed money to an amount which, for him, was considerable. He kept no books, and is not able to give any details of his expenses, though he says, in general terms, that he used all the money in living and paying other debts. The first specification of the objecting creditors is, that the bankrupt caused and permitted loss, waste, and destruction of his estate and effects, and misspent and misused the same, setting out the items. And it requires no forced construction of the evidence to find this charge to be sustained. But there is no such objection to a discharge to be found in the Bankrupt Act, unless the loss, etc., occurred after the filing of the petition. Every kind

of fraud is carefully prohibited, but not extravagance or waste, except gaming. The statute may be supposed to be framed upon the presumption that men will not give credit to spendthrifts. I may wish the law were otherwise, but I cannot say that under any fair interpretation of it, the first specification, though sustained, is a good ground, in law, to prevent the bankrupt's discharge. After the argument, the parties consented to an amendment in which a fraudulent concealment of the same estate and effects was charged, but the evidence does not support this view of the case.

The second and third charges were not pressed; they are too vague to require or admit of testimony in their support, and none was given. The fourth avers that Rogers was a tradesman, and kept no books of account.

It is true that he kept no books. Was he a merchant or a tradesman? He appears to have sold most of the goods and chattels for which he had contracted debts, namely, one carriage, one sleigh, two pairs of horses, one piano, one harness, and part of a lot of cigars. It is doubtful whether, in most cases, he intended to sell them at the time he bought. For example, one pair of the horses ran away with him and broke the sleigh, and he sold them; he used a part of the cigars, and sold a part.

Giving the evidence its full effect, and drawing the most favorable inferences for the creditors, the instances of trading, such as I have mentioned, would not exceed four, and as to these, it may, perhaps, be said, that the debtor's purpose was to sell them if he should find it necessary. But I do not find that he ever formed the deliberate purpose of buying goods to sell them again in order to raise money. Such conduct might be within the mischief and within the letter of the act. So might an amount of trading, however small, connected with an intent to deal generally. *Ex parte* Magennis; Rose, 84. But this bankrupt does not appear to have considered himself a trader, or to have held himself out as such, or to have been so considered by others. If the acts he did make him a tradesman, any single act of buying and selling must have that effect; for they were isolated and separate acts, having no connection

with each other, and showing no intention to set up any trade. He bought goods which he could use and did use, and when he was pressed for money, or even, to put the worst construction on his conduct, when he contemplated bankruptcy, he sold them. If any sale was fraudulent, or if any preference were given to other creditors, or any property or money kept concealed, he would be fully within the act. If such things were done, they have not been proved, and upon the point now before me I must say that the evidence does not sustain it.

Another specification sets up a buying of goods when the debtor knew he could not pay for them, and another, a fraudulent buying of a piano. Neither of them is within the act. The frauds which prevent a discharge are, nearly all, such as tend to the injury of creditors generally. One who has been induced by fraudulent representations to sell goods to the bankrupt, finds his remedy in the right to receive a dividend, and to hold the remainder of his debt undischarged by the certificate.

I have held that any fraud on the act may be given in evidence, including all that are mentioned in Section 44; and in that section will be found two possible frauds which may affect only one or a part of the creditors; but neither of them is set up in this case.

I am constrained to say, therefore, that in my opinion the discharge must be granted, upon payment by the bankrupt of the fees mentioned in the eighth specification, which are not disputed, and which the assignee has no funds to meet.

F. W. Kittredge, for creditors.

A. W. Boardman, for bankrupts.

UNITED STATES DISTRICT COURT—OREGON.

The holders respectively of two promissory notes past due, petitioned jointly to have the drawer, their debtor, adjudicated bankrupt. The defendant denied insolvency, and pleaded payment of said two notes by petitioners accepting certain other notes, provided they proved on inquiry to be collectible. Petitioners demurred to the sufficiency of the answer.

In re Ouimette.

Held, defendant may set forth in his answer as many defenses as he has, but they must be stated separately. The reduction of indebtedness on the two notes of the debtor, below two hundred and fifty dollars, by the conditional payment, disables petitioners to maintain suit.

If the notes received in conditional payment turned out to be worthless, and that the alleged payment was therefore no payment, petitioners should reply to the plea.

Demurrer overruled, with leave to reply.

In re L. H. Ouimette.

Deady, J.—In this case there are two creditors who petition jointly. The petition states that on November 30, 1869, said Ouimette being indebted to the petitioners respectively in the sums of one hundred and fifty-seven dollars and forty-five cents and one hundred and forty-four dollars and fifty-four cents, on account of goods, etc., theretofore sold and delivered to said Ouimette, made and delivered to said petitioners his two promissory notes for said sums respectively, payable to their several orders, sixty days after the date thereof, with interest at one per centum per month; and that said petitioners are still owners and holders of said accounts and notes; and that the sums aforesaid are respectively payable thereon. That on or about December 15, 1869, said Ouimette committed an act of bankruptcy: in that said Ouimette, being then insolvent, did sell and deliver all his stock of goods, then used by him in his business of merchant, at St. Louis, in the district aforesaid, the same being then and there of the value of fifteen hundred dollars, to Pierre & Mull, of the place last aforesaid, in consideration of the relinquishment of a debt of twelve hundred dollars then due said Mull from said Ouimette, with interest, thereby to give a preference to said Mull; and with intent to hinder, delay, and defraud his other creditors; and with intent to defeat and delay the operation of the Bankrupt Act:—Wherefore the petitioners pray that Ouimette may be adjudged a bankrupt, etc.

On February 3, 1870, Ouimette appeared and answered the petition. The answer is long and rambling. Besides the specific denials of certain allegations in the complaint, it contains two or more supposed defenses to the petition, but neither these

denials or supposed defenses are separately pleaded, but, on the contrary, form one continuous and mingled statement.

At common law the defendant was confined to a *single* plea, consisting of a *single* matter of defense. (Gould's Pleading, 426.) But this rule, sometimes operating unjustly, led to the enactment of the statute of 4 Ann, C. 16, Section 4, which provided that the defendants, with leave of the court, might "plead *as many several matters* as he shall think necessary for his defense."

In the construction of this statute, it was held that it did not authorize the defendant to allege more than *one* defense in *one* plea. In other words, that each plea must still be *single* as at common law (Gould's Pleading, 429, 30); and that it did not extend to dilatory pleas. (*Ibid.*, 431.)

On this subject, the rule prescribed by the Code, in effect, coincides with the rule of the common law as modified by the statute of Ann. It provides that the answer shall contain a specific denial of each material allegation of the complaint controverted by the defendant, and a statement of any new matter constituting a defense or counter-claim; also, that the defendant may set forth by answer as many defenses and counter-claims as he may have; but they shall be *separately stated*, and refer to the causes of action which they are intended to answer, in such manner that they may be distinguished. (Civil Code, 156,7.)

After denying certain allegations in the petition, respecting the indebtedness and the solvency of Ouimette, and the commission of the act of bankruptcy, the answer "further alleges" that Ouimette "has property which he holds and owns in his own right, over and above all debts and liabilities, of the value of two thousand dollars." Then follows an allegation by way of "further answering said petition," to the effect that, on January 5th, 1870, at the request of the petitioners, Ouimette delivered to petitioners the notes of third persons, then held and owned by said Ouimette, for the aggregate sum of two hundred and eighty-five dollars and twenty-six cents principal, with interest from various dates within the

year 1869, with "the agreement that said petitioners should make inquiries as to whether said notes were collectible, and, if so, they are to be received by said petitioners in payment of said notes of him, said Ouimette, to said petitioners;" and that said notes, with the exception of one for the sum of fifty-two dollars and twenty-six cents, with interest from March 16th, 1869, "were good and collectible;" and that said "petitioners have never notified said Ouimette that said notes were not collectible," but have proceeded to collect said notes, and have collected some portion of the same, but what amount he is unable to state.

Then follows an allegation to the effect that on the day when the notes of the petitioners became due, that Ouimette tendered to each of said petitioners the sum due on his note respectively, in United States gold coin, upon condition that said petitioners would deliver to said Ouimette said notes and the notes by him "deposited" with said petitioners; but that said petitioners refused to deliver said Ouimette said notes, or either of them, and that said Ouimette "is still ready to pay said sum upon the surrender of his said notes, and deposit the same with the clerk of this court, to be and remain a continuing tender, upon the same conditions of the surrender of his said notes set forth in the petition, and said notes deposited with said petitioners." As a conclusion, it is then alleged, that, "by reason of the facts aforesaid, the petitioners have elected to receive the said notes deposited as aforesaid in payment of Ouimette's said notes in the petition set forth, and that said notes are paid. Wherefore he prays that said petition may be dismissed," etc.

The petitioners, by their attorneys, demur to all the allegations in the answer following the specific denials of the allegations in the complaint, because "said matter constitutes no defense to the proceedings in bankruptcy herein," with special causes of demurrer also assigned.

The allegation as to the value of the property which the defendant "owns and holds," is simply surplusage and immaterial, and ought to be stricken out. But it is no cause for

demurrer. Ouimette having denied the allegation that he was insolvent at the time of the sale of the goods to Pierre and Mull, should have rested there. Besides, if it were proper to set up the value of his assets as compared with his liabilities, to show thereby that he was not insolvent, it should have been pleaded separately.

The pleas of payment by the delivery of notes of third persons, and of tender in cash, after petition filed, are run together as one story or transaction. They are distinct matters, and *if* defenses, distinct ones, and should have been pleaded separately —that is, so that each one would stand or fall by itself, without the aid of the other. On this account this part of the answer should have been stricken out. But this objection not having been taken, for the purpose of this demurrer, these defenses or matters will be considered, in this respect, as if they had been properly pleaded.

To maintain an action to have one adjudged a bankrupt, it must appear from the petition that the party proceeded against owes debts provable under the Bankrupt Act, to the amount of three hundred dollars, and at least two hundred and fifty dollars thereof to the petitioner or petitioners, and that such party has committed an act of bankruptcy. The debt and the act of bankruptcy, taken together, constitute the cause of action. The defense set up may go to either or both of these matters, and there may be several defenses to each, but they must be separately stated.

The matters pleaded in the answer as a tender of the petitioner's debts, after petition filed, are immaterial, and might have been stricken out as irrelevant. They constitute no defense to the action. If, as is alleged, Ouimette is insolvent, he has no right to tender or pay to these petitioners their debts in full. It would be a fraud upon his other creditors. Nor would the petitioners have any right to receive such proffered payments, because, having alleged the insolvency of Ouimette, they would be acting in violation of the Bankrupt Act, and run the risk of forfeiting their debts. On the other hand, if Ouimette did not commit an act of bankruptcy of which insol-

vency is a material ingredient, it matters not, so far as this proceeding is concerned, whether he owes the petitioners or not, or whether he tendered them the amount due them or not. This is not an action to collect a debt, but to procure an adjudication of bankruptcy against Ouimette, and therefore a plea of tender of the amount due the petitioners can under no circumstances be a defense to it. The allegation of the petition is, that the party is not only indebted to the petitioners, but that he committed an act of bankruptcy with intent to evade the law, and to defraud them. To this it is no sufficient answer to allege, True—but I now tender you the amount of your debts.

In the course of the argument, counsel for Ouimette suggested that, in the absence of any allegation to the contrary, the court might presume that the petitioners were his only creditors, and therefore the tender might be lawfully made and received. But I do not think such a presumption would be according to the ordinary course in such matters, and therefore it ought not to be made. If, in fact, there are no other creditors, and for that reason a plea of tender would be a good defense to the action, the plea should have contained an allegation to that effect. The only ground upon which such a plea could be considered to constitute a defense would be, that payment by the alleged bankrupt under such circumstances could neither prejudice or injure any one, and therefore no one could complain of it. But, even then, I do not think such a plea ought to be held to be a good defense. The fact that there are no other creditors to be prejudiced by and complain of the payment, cannot be presumed to be within the knowledge of the petitioners. Before they accept the tender they must inquire concerning it, and they may be mistaken. Besides, no understanding of the petitioners or proceeding between them and the alleged bankrupt upon such question, could prevent third persons, who might be creditors, from asserting their rights as such.

Treating this portion of the answer as frivolous and immaterial, there remains to be considered the allegation which in

effect amounts to a plea of part payment in the promissory notes of third persons. It will be observed that the plea does not state whether or not these notes are negotiable, or whether or not they are indorsed by Ouimette to the petitioners. For the purposes of the demurrer, I will assume that the notes are negotiable, and that they were so transferred to the petitioners as to authorize them to sue and collect them as owners.

There is no question but what, with the consent of the creditor, payment of a pre-existing debt can be made in the promissory note of the debtor or that of a third person. But there is some disagreement in the decisions as to what is sufficient evidence of such consent.

In Massachusetts it is held that the delivery and acceptance of the note is sufficient evidence that it was received in payment, and it will be so determined, unless it is clearly shown, that such was not the intention of the parties. (5 Mass., 299; 6 Mass., 143; 10 Mass., 147; 2 Met., 168.)

In New York and other States and in the national courts, it is held that the mere delivery and receipt of the note do not constitute payment, but it must also appear that the creditor *expressly* agreed to take it as payment. Without such agreement being shown, the delivery of the note is only a conditional payment—a payment provided that the note is paid when it becomes due. It is, however, to be deemed an absolute payment if the creditor parts with or is guilty of negligence in presenting it for payment or the like; but it seems he is not bound to sue upon it. (5 John., 68; 9 John., 310; 3 Wend., 67; 5 Wend., 85, 491; 6 Wend., 659; 12 How., 225; 14 How., 240.) The latter rule is the one which must prevail in this court.

The delivery of the notes to the petitioners under the circumstances stated in the plea amounting to a conditional payment. If the notes were paid or collected according to their tenor, the debt of the petitioners would be paid and extinguished, if they were not so paid or collected, and the petitioners were not guilty of negligence in the premises, the delivery would amount to nothing.

The conditions upon which the notes were taken by the petitioners as stated in the plea, differ, I think, in one particular from those which the law would attach to the transaction in the absence of any special agreement between the parties.

The petitioners having agreed to take the notes as payment if they were *collectible*, thereby bound themselves to *sue* upon them if necessary to their collection. An agreement to take notes as payment if they are or proved *collectible*, implies something more than to so take them if they are paid. It is equivalent to an agreement to *collect* them, so far as the same can be done by the use of ordinary means and diligence.

I know it was said in the argument, that the petitioners only agreed to take these notes as payment if, upon inquiry, *they* found them collectible, that is, would admit or consent that they could be collected; and that until it appears that such consent was given, the delivery of the notes has no effect upon the rights of the parties whatever. Such may be the mere literal sense of the contract or condition as stated in the plea, but I do not think that it ought to be so interpreted or that the parties so understood it. If the notes were not to be considered payment unless the petitioners assented to the conclusion that they were collectible, they might, if they chose, refuse that assent when it was plain that the payers were solvent and abundantly able to pay them. If the notes were in *fact* collectible, whatever the petitioners might say or do in the premises, from the date of their delivery they were so far payment of their debts.

Now it is averred in the plea that over two hundred dollars of these notes are collectible, and that the petitioners have collected part of them. If so, they are so far a payment of the petitioners' debts, and the balance being less than one hundred dollars, would not be sufficient in amount to enable the petitioners to maintain this action. This it seems to me is a good defense to the action, or matter in abatement of it.

It may be said that, although the notes are collectible, that the petitioners having *now* knowledge of the insolvency of Ouimette, cannot collect them and apply the contents on their

notes without thereby taking a preference contrary to the act, and running the risk of forfeiting their debts to the other creditors. But I do not think this argument sound. If the money due on the notes is received by the petitioners at any time, as between them and third persons, in contemplation of law it is received at the time of the delivery of the notes—the conditional payment. In other words, the actual receipt of the contents of the notes by the petitioners relates back to the conditional payment, and converts it into an absolute one. The question of preference then, in the receipt and collection of these notes by the petitioners, would have to be determined by the facts as they existed when the conditional payment was made. If as between the petitioners and third persons the former were justifiable in receiving these notes when they did in payment of their debts, then they became the owners of them, and their right to collect and receive the money on them at any subsequent time, cannot be affected by the fact that Ouimette has since become insolvent, or that they have since learned or have good reason to believe that he was *then* insolvent.

The facts stated in the plea show a part payment of the petitioners' debts; and the sum remaining due—being less than two hundred and fifty dollars—does not enable the petitioners to maintain this action. The plea is therefore a good defense to it, and the demurrer must be overruled.

If this conditional payment has in fact turned out to be no payment by reason of the notes proving worthless or uncollectible, notwithstanding the due diligence of the petitioners, they should reply to the plea, and on the trial of the issue produce the notes and surrender them to Ouimette.

It is not necessary to more than notice the allegation of the plea that the petitioners by refusing the alleged tender, *then* elected to take the notes as payment. At that time the petitioners were no more at liberty to receive the notes in payment than the cash. On the argument, counsel for Ouimette made the point that the petitioners could not maintain this action, because it was brought before their debts were due. But this objection, if made at all, should have been made by demurrer

to the petition. However, I am satisfied that the objection is not tenable, as a reference to the statute will show. By Section 39 of the Bankrupt Act, it is provided that "any person" * * * may "be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts *provable under this act* amounts to at least two hundred and fifty dollars." Section 19 provides—"that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and *all debts then existing but not payable until a future day* * * * may be *proved* against the estate of the bankrupt."

These provisions seem to settle the question. The debts of the petitioners, although not then due, *existed* at and before "the adjudication of bankruptcy," and were therefore *provable* debts. Being *provable* debts, they were sufficient to maintain the petition. An order will be entered overruling the demurrer, with leave to the petitioners to reply upon the payment of five dollars costs.

Whalley & Thayer, for petitioners.

Mitchell & Dolph, for the alleged bankrupt.

UNITED STATES DISTRICT COURT—N. D. GEORGIA.

The wife of a voluntary bankrupt in Georgia sought to have set apart out of his real estate the homestead provided by the State laws of 1868, filing her petition therefor with the State officer on the same day her husband petitioned in bankruptcy, and proceedings in setting it apart concluded on the day before the husband was adjudicated a bankrupt.

Held, the exemptions authorized by Section 14 are limited to those established by the State laws in existence in 1864, and cannot be extended to exemptions granted by State laws enacted subsequently. The Bankruptcy Court acquired exclusive jurisdiction of the bankrupt and his estate, on the filing of his petition in bankruptcy. The Ordinary was without jurisdiction in setting apart the homestead, and his action therein declared null and void.

In re David R. Askew.

FACTS.

The legislature of Georgia, on the 3d day of October, 1868, passed a new Homestead Law, which provides that any head

of a family who may be indebted beyond his ability to pay, may, by application to the Ordinary of his county, have surveyed and set apart as a homestead, two thousand dollars specie value in realty, and one thousand dollars specie value in personalty, which shall be exempt from levy and sale by virtue of the process of any court; and provides further, that in case the husband shall neglect or refuse to apply for the setting apart such homestead, the wife may apply to the Ordinary and have the same set apart. This law also contains a provision, that the passage of this law shall not preclude a debtor from choosing the exemptions allowed by the 2013th Section of Irwin's Revised Code, and a debtor who chooses the exemptions allowed by one of these laws, shall have none of the benefits of the other.

David R. Askew filed his voluntary petition in bankruptcy, and his wife, Eliza A. Askew, made her application to the Ordinary of the county for the setting apart of homestead, under the statute of 1868, both on the same day.

OPINION OF THE REGISTER.

The question here presented for consideration and decision is this: "Can a married woman, under the law, claim a homestead under the new constitution and laws of Georgia, out of the property of her husband, at the same time that the husband seeks relief and a discharge from his debts in a court of bankruptcy, he returning the property in his schedule of assets, out of which he claims a homestead?"

David R. Askew filed his voluntary petition in bankruptcy on the 30th day of December, 1868, and on the same day, Mrs. Eliza A. Askew, his wife, filed her application before the Ordinary of Spalding county for the setting apart and valuation of homestead. Mr. Askew returned in his schedule of assets five hundred and ten acres of land. This same land, under the order of the Ordinary, was surveyed and platted by the county surveyor on the 8th day of January, 1869, and the whole set apart as a homestead, which action of the county surveyor was approved by the Ordinary on the 11th January, 1869, and on

the next day, January 12th, 1869, Mr. Askew was adjudged a bankrupt by the court of bankruptcy.

It is admitted that Mr. Askew knew of his wife's application to the Ordinary, and no one can reasonably doubt that she knew of his application in bankruptcy; so it seems to have been a concerted arrangement between husband and wife—he to get a discharge from his debts in bankruptcy, and she to cover all the property by a homestead under the State exemption law of October 3d, 1868.

The Bankrupt Law, Section 14, expressly limits the exemptions to be allowed a bankrupt in bankruptcy to the State exemption laws of force in 1864. The State exemption law that was of force in 1864, in Georgia, is found in Irwin's Revised Code, Section 2013. This exempts to each head of a family but fifty acres of land and five acres additional for each child under sixteen years of age. Mr. and Mrs. Askew have three children under sixteen, and under the said 2013th Section, would be allowed sixty-five acres as exempt; but under the law of October 3, 1868, Mr. Askew claims the whole five hundred and ten acres.

Mr. Askew, being fully cognizant of the action his wife was taking, and offering no objection thereto, thereby showing consent on his part, is in the same condition as if he had made a transfer of the property to his wife, and she, being fully cognizant of his bankruptcy and accepting such transfer by the action she took, is in the same condition as if she had accepted a deed to the property from him. All such transfers are declared void by the 35th Section of the Bankrupt Act.

The act of 1868, under which the homestead is now claimed, provides, in the 14th Section thereof, that a debtor may take his choice and choose the exemptions allowed by the 2013th Section of Irwin's Revised Code, instead of those allowed by this act, and adds: "But no person who shall be allowed the exemptions under those laws, shall take any benefit under this act." Mr. Askew, by filing his petition with the schedules annexed, in bankruptcy, on the 30th day of December, 1868, then elected to take the exemptions allowed by the Bankrupt Law (the

striking from his schedule B 5, the sixty-five acres allowed by the 2013th Section, Irwin's Code, can make no difference). The Bankrupt Law allows that exemption, and the law gives it to him whether he claims it or not. Having elected to go into bankruptcy, he is bound by the provisions of the Bankrupt Law; and having thus elected to take the exemptions allowed by the 2013th Section of Irwin's Code, he is not entitled to any benefit under the State exemption act of 1868.

This is evidently a case wherein the husband and wife are acting in concert, and attempting to dispose of the debts under the Bankrupt Laws and the assets under the State law. Such a proceeding cannot be tolerated in bankruptcy: because, when a court of bankruptcy takes jurisdiction at all, it assumes the entire jurisdiction of both the person and property of the bankrupt. When a proper case is made, the Bankruptcy Court takes jurisdiction, and such jurisdiction is exclusive. A proper case was made when Mr. Askew filed his petition in bankruptcy. The Bankruptcy Court took jurisdiction of Mr. Askew and his property on the filing of his voluntary petition on the 30th December, 1868; hence all his property was in the legal custody of the Bankruptcy Court from that time, and the action of the court of Ordinary of the 8th and 11th January, 1869, is null and void, because then that court had no legal jurisdiction; the property then being in the legal custody of the Bankruptcy Court.

A question may be made as to the *time* when a court of bankruptcy assumes jurisdiction of the property of a bankrupt. The rule is different in case of voluntary bankruptcy from that in involuntary bankruptcy. In a case of *involuntary* bankruptcy the bankruptcy is disputed, and the question is not determined until the judgment of the court is pronounced. The adjudication of bankruptcy, in that case, transfers the custody of the property to the court. But in a case of *voluntary* bankruptcy, the filing of the petition is an acknowledgment under oath of the bankruptcy. The filing of the petition is a surrender of the property named in the schedule to the court for the benefit of the creditors. On this point Judge Blatchford,

of the Southern District of New York, *in re* Henry Vogel, 2 N. B. R., 427, after quoting the several provisions of the Bankrupt Act relating thereto, uses the following language: '

"It is manifest from these provisions that when a voluntary petitioner in bankruptcy files his petition, in due form, he becomes *eo instanti* a bankrupt, so far as any interference with the property named in his schedule is concerned, and that such property is thereby brought into the Bankruptcy Court, and placed in its custody and under its protection, as fully as if actually brought into the visible presence of the court. Being in the custody of the Bankruptcy Court, no other court, and no person acting under any process from any other court, can, without the permission of the Bankruptcy Court, interfere with it, and to so interfere is a contempt of the Bankruptcy Court."*

This is a case of voluntary bankruptcy. David R. Askew filed his voluntary petition in bankruptcy, on the 30th day of December, 1868, and *eo instanti* he was a bankrupt, so far as any interference with the property named in his schedule is concerned; and hence the survey and valuation of property, and setting apart the homestead under the process of the Court of Ordinary on the 8th of January, 1869, and its approval by the Ordinary on the 11th, were unauthorized by law, and are null and void.

The five hundred and ten acres of land and other property named in the schedule, filed with his petition in bankruptcy, by David R. Askew, on the 30th day of December, 1868, except such portion thereof as is exempt by the Bankrupt Law, and the State exemption laws of force in the year 1864, must pass to the assignee in bankruptcy, for the benefit of the bankrupt's creditors.

ALEXANDER G. MURRAY,
Register.

ERSKINE, J.—I have read and carefully considered the argu-

* *Peck* v. *Jenness*, 7 Howard, 612, 625; *Williams* v. *Benedict*, 8 *Id.*, 107, 112; *Wiswell* v. *Sampson*, 14 *Id.*, 52, 66; *Peale* v. *Phipps*, *Id.*, 368, 374; *Taylor* v. *Carryl*, 20 *Id.*, 583, 594–597; *Freeman* v. *Howe*, 24 *Id.*, 450; *Buck* v. *Colbath*, 3 Wallace, 334.

ments of the respective counsel in this matter, and I approve the opinion of the Register, and affirm his clear and able decision.

The clerk will certify this affirmation to the Register.

UNITED STATES DISTRICT COURT—S. D. GEORGIA.

In the distribution of the assets of the bankrupt derived from the collection of a promissory note, a creditor whose claim is in judgment has no priority, and will share *pro rata* with the other creditors.

In re Erwin & Hardee.

I, Frank S. Hesseltine, Register of the said court in bankruptcy, do hereby certify, that in the course of the proceedings in said cause, the following question pertinent to the same arose; and was stated and agreed to by Harden & Levy, counsel for John U. Meyer, creditor, and Hartridge & Chisholm, who appeared for Calvin L. Cole, a creditor of the said bankrupts.

Erwin & Hardee filed their petition to be adjudicated bankrupts, December 31, 1868.

They returned among their assets one promissory note for twelve thousand dollars, which the assignee collected.

Calvin L. Cole proved his claim on a judgment obtained against Erwin & Hardee, in November, 1868, and, at the second meeting of creditors, claimed that the said judgment had priority, and should first be paid in full, which claim counsel for John U. Meyer opposed, and asked that the assets be distributed *pro rata*. And the said parties requested that the issue thus raised should be certified to your honor for your opinion thereon.

OPINION OF THE REGISTER.

In the case of *Elijah E. Winn*, 1 B. R., 131, your honor decided that a lien of the judgment upon the property of a bankrupt "follows the property into the hands of the assignee, and

that a judgment in this State retains its lien in the court of bankruptcy."

In accordance with this decision, where property of the bankrupt, which was subject by the laws of this State to the lien of judgments, has been sold free, and discharged from the incumbrances thereon, it has been my practice, as Register, in ordering a distribution of the assets derived from the sale of the property, to pay the creditors holding judgments according to the priority of their liens. It is only in such cases where the lien upon the property was transferred to the fund in court, derived from the sale of the property, that I have considered the judgment-creditor as entitled to any priority in the distribution of the assets.

In this case the fund in court is derived from the collection of a promissory note. The judgment had no lien upon the said notes in the hands of the bankrupts, for the Code, Section 3524, expressly declares, "a judgment has no lien upon promissory notes in the hands of the defendant." Hence, by virtue of a lien, it cannot claim to be first satisfied out of the fund derived from this note.

The judgment-creditor, Cole, I understand, bases his claim to be first paid in full, upon the laws of this State, governing the distribution of the estate of a decedent, and of money brought into a State court.

Would he, under like circumstances, possess any priority as distributee of the estate of a decedent?

It is true that paragraph 2494 of the Code, places in prior rank over written obligations and book accounts, "Judgments, mortgages, and other liens created during the lifetime of deceased, and to be paid according to their priority of lien;" but it also says, "*mortgages and other liens on specific property to be preferred only so far as such property extends.*"

But the Code of Georgia does not govern in the distribution of the estate of a bankrupt. The bankrupts' assets must be divided in accordance with the provisions of the Bankrupt Act. Section 27 enacts—"That all creditors whose debts are duly proved and allowed, shall be entitled to share in the bank-

rupt's property and estate, *pro rata*, without any priority or preference whatever, except that wages due from him to any operative, or clerk, or house-servant, to an amount not exceeding fifty dollars, etc."

By the Bankrupt Act the judgment-creditor enjoys no advantage, except where the bankrupt returned property upon which the judgment is a lien by the laws of the State in which the property lies. Unquestionably in this case, Cole, the judgment-creditor, must share *pro rata* with the other creditors.

Respectfully submitted,

FRANK S. HESSELTINE.

ERSKINE, J.—After a careful consideration of the question submitted and the ruling of the Register, I am clearly of the opinion that there should be a *pro rata* distribution, and therefore affirm the decision of Mr. Register Hesseltine. The clerk will please certify this to Mr. Hesseltine.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Individual creditors of members of a firm duly adjudged bankrupts on petition of one of the firm, applied to the court to set aside the adjudication, because of absence of certain jurisdictional averments in the petition.

Held, the questions involved in such application can properly be raised only by the creditors opposing the bankrupt's application for discharge, at the proper time.

Want of jurisdiction is good ground to refuse a discharge.—A discharge granted without jurisdiction is no discharge.

In re JOHN R. PENN *et al.*

BUTTERFIELD, J.—In this case John R. Penn, Charles V. Culver, and Lucien H. Culver, both individually, and as members of the firm of Culver, Penn & Co., have been adjudged bankrupts. Thomas Hoge, a creditor of Charles V. Culver individually, and William Raymond, a creditor of the said firm, and also a creditor of Charles V. Culver individually, now apply to the court to set aside the adjudication of the

bankruptcy of the said firm, and of Charles V. Culver and Lucien H. Culver, on the ground that this court had no jurisdiction to make such adjudication, by reason of the absence of certain jurisdictional averments in the petition. The petition was filed by Penn against the Culvers as his copartners, and prayed that the copartnership and its said three members might be adjudged bankrupts. An order to show cause was issued against the Culvers, and on the return day they appeared by attorney and filed a written consent to be adjudged bankrupts in this proceeding. They do not question the adjudication; on the contrary, they and Penn, on notice from the said creditors, oppose this application.

I do not think the questions sought to be raised by these creditors can be raised by them at this stage of the proceedings or in this way. If they wish to oppose the application of the bankrupt for their discharges on the ground that this court has no jurisdiction of the case, they can do so when the time arrives, as was done in the case of *In re* Little, 2 N. B. R., 294, where a discharge was refused on such ground.

If they shall not so oppose, and a discharge shall be granted, such discharge, if granted without jurisdiction, will be void; for, by Section 34 of the act, it is only a discharge duly granted which is of any avail.

A discharge granted without jurisdiction to grant it is not duly granted and is no discharge. It is unnecessary therefore, to pass upon the questions raised and discussed on the hearing.

The motions are denied.

R. Sewell and *A. B. McCalmont* (of Pennsylvania), for the creditor.

S. N. Bangs and *S. K. Miller* for the bankrupts.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

A creditor may prove a claim based on a debt existing at the time of proceedings commenced in bankruptcy, notwithstanding he may in a suit to recover the same have obtained judgment thereafter.
The debt is not so merged in the judgment as to deprive the creditor of the right to prove it.

In re STEPHEN BROWN.

AT a court of bankruptcy held at Kingston in said district on the 12th day of February, A.D. 1870, before Mr. Theodore B. Gates, Register of said court in bankruptcy,

Jacob Lisk, a judgment-creditor of the above-named bankrupt, applies for leave to prove his judgment, under the proceedings in bankruptcy.

I declined to take the proof on the ground that the judgment is not provable. Thereupon the creditor filed the annexed statement and requested that the question be certified to the court.

Brown was adjudicated a bankrupt on the 21st of December, 1869. From the annexed statement of Lisk, it appears that his action was commenced on the 26th of December, 1869, and that judgment was entered on the 19th day of January, 1870. I presume the judgment was recovered upon a debt which existed at the date of adjudication, although the statement fails to say so. Assuming that the debt existed at the date of adjudication of bankruptcy, the question is whether the suit and judgment divested the debt of its provable quality in these bankrupt proceedings. I declined to take proof of the debt, in view of the construction that has been given to the first clause of Section 19 of the Bankrupt Law. It was held *In re* Williams, 2 N. B. R., 229, that where a judgment is rendered after the commencement of proceedings in bankruptcy, upon a debt which existed before that time, neither the debt or the judgment is provable. The debt is merged in the judgment and the judgment did not exist at the time of the adjudication of bankruptcy.

THEODORE B. GATES, *Register.*

In re Brown.

STATEMENT OF JACOB LISK.

To Hon. Theodore B. Gates, Register, etc., etc.

Application is hereby made to you by Jacob Lisk, a creditor of the estate of Stephen Brown, declared a bankrupt on his own petition, through James W. Hisurd, his attorney, to prove the sum of two hundred and seventy dollars and fifty cents ($270.50), being the amount, exclusive of costs, recovered against the said Stephen Brown by judgment on the 19th day of January, 1870. That no execution has been issued on such judgment, nor no steps taken toward the collection thereof since its recovery. That such judgment was recovered in good faith and with no intent to hinder or delay the operation of the Bankrupt Act. That the said creditor does not ask to prove any claim for costs on said judgment, but simply the amount of the original debt.

That the action was commenced on the 25th day of December, without any notice, and before any proceedings in the Court of Bankruptcy had been instituted. Upon the grounds and for the above reasons, the creditor claims and respectfully insists that he be permitted to prove the amount of the original indebtedness, on having the judgment canceled, and that to your certificate to the court you will please annex this application.

Dated Coxsackie, February 10th, 1870.

JACOB LISK, *Creditor.*

By JAMES W. HISURD, *Attorney.*

BLATCHFORD, J.—I do not concur in this view. I have examined the decision of the District Court for the District of Connecticut in the case of *in re* Williams, 2 N. B. R., 229, and am compelled to dissent from it. The point ruled in it is that where a judgment is recovered against a bankrupt, after an adjudication of bankruptcy against him on a debt which existed against him prior to such adjudication, the debt is so merged in the judgment that it cannot be proved in bankruptcy, and the judgment cannot be proved because it was not an existing debt at the time of the adjudication. The theory is that the debt

was so merged as to be extinguished, and that the judgment constitutes a new debt, which takes date from the time of its recovery. There is no doubt of the correctness of this principle as respects proceedings in ordinary cases against the debtor or his property, but it has no applicability under the Bankruptcy Act. The 19th Section of the act declares that all debts due and payable from the bankrupts at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, may be proved against the estate of the bankrupt. If the debt in this case existed at the time of the adjudication, it is provable, although the judgment is not provable as such, because it did not then exist. The debt has never been paid or satisfied. This must be the proper construction under the act, or the provisions of Section 21 of the act are nugatory. That section provides that when a suit is pending by a creditor against a bankrupt for a debt or claim, if the amount due the creditor, that is, the amount due the creditor on or for the debt or claim, is in dispute, the suit may, by law of the Bankruptcy Court, proceed to judgment for the purpose of ascertaining the amount due on or for the debt or claim, and that such amount may be proved in bankruptcy. The judgment, as such, is not to be proved, but the amount of the debt or claim as it stood at the time of the adjudication, is to be proved. If the fact of obtaining the judgment extinguishes the debt, the amount of the debt could not be proved. I think the clear intent of the act is that the recovery of a judgment after the adjudication on a debt which existed at the time of the adjudication, shall not affect the provability of the debt. If it were otherwise, a great hardship would be worked in many cases. A creditor might, in ignorance of the adjudication, go on and obtain a judgment for his debt and find himself deprived of the power of proving either his debt or his judgment. I think the debt in this case, if it existed at the time of the adjudication, is provable.

The clerk will certify this decision to the Register, Theodore B. Gates, Esq.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where assignees in bankruptcy impeached a transaction involving a transfer by the bankrupts of a mortgage and promissory notes to holders of their check, if it be shown to have been made out of the ordinary course of business, it is *prima facie* evidence of fraud, and the burden of proof is cast upon the defendant to show the validity of the transaction.

In Equity.

GEORGE C. COLLINS AND HARVEY FARRINGTON, *Assignees in bankruptcy of* JOHN MURDOCK MACKAY AND JOHN NEILSON, *v.* RICHARD BELL, FREDERICK GUNDRY, JOHN MURDOCK MACKAY, AND JOHN NEILSON.

BLATCHFORD, J.—The first question of importance involved in this case is as to whether or not the transfer of the bond and mortgage and the promissory notes by the bankrupts to Bell and Gundry, was made in the usual and ordinary course of business of the bankrupts. If it was not, that fact is *prima facie* evidence that a fraud was committed on the Bankruptcy Act by the transfer, and the burden of proof will be upon Bell and Gundry to show the validity of the transaction as respects a fraud on the act. If it shall be shown that the transfer was made in the usual and ordinary course of business of the bankrupts, it will then be for the plaintiffs to establish, in order to recover: 1st, That the bankrupts were insolvent or contemplated insolvency when they made the transfers to Bell and Gundry; 2d, That Bell and Gundry had, at the time such transfer was made, reasonable cause to believe that the bankrupts were insolvent or were acting in contemplation of insolvency, and that a fraud on the act was intended by the bankrupts. The inquiry as to such reasonable cause of belief would seem, from the papers now before the court, to be the vital one in the case, and its solution would seem to be dependent, in a very great measure, upon what actually transpired between the defendant Gundry and John Maxwell Mackay, at the time the latter delivered to the former the bond and mortgage and the notes. Gundry's statement is, that the only information given

to him at the time by John Maxwell Mackay, was that the bankrupts were a little short of money that day, and wished him to substitute the bond and mortgage and the notes in place of the currency check. No account of the interview by John Maxwell Mackay, is furnished on this motion. It is impossible to arrive at any satisfactory conclusion as to the merits of the case on the imperfect and *ex parte* statements given for this motion. I am free to say, however, that on the papers now before me, I should not originally have granted the injunction. The weight of them is rather with the defendants, Bell and Gundry. As it is not suggested that they are not abundantly responsible pecuniarily, and, as the security of the assets which the plaintiffs are seeking to reach is not shown to be in peril, I grant the motion to dissolve the injunction, and deny the motion for a receiver, leaving the case to go to a final hearing on proofs.

T. C. T. Buckley, for the plaintiffs.

G. C. Barrett, for the defendants.

NEW YORK COMMON PLEAS.

Under Section 21 of the Bankrupt Law, a bankrupt who has omitted to apply for a stay of proceedings in an action against him, pending the question of his discharge, may nevertheless apply after judgment to have supplementary proceedings against him thereon stayed, on the ground that he has been discharged, if the plaintiff's demand be one affected by the discharge.

The "World" Company *v.* Brooks.

The action in which these proceedings were taken was brought by The World Company, proprietors of a newspaper, against Edwin A. Brooks, a dealer in boots and shoes, to recover for advertising the business of defendant.

Pending the action, the defendant filed a petition in bankruptcy, but did not apply for a stay of proceedings in the action. The plaintiffs' claim was not proved in bankruptcy, but plaintiffs proceeded to judgment. After judgment had

been recovered, the proceedings in bankruptcy were consummated by the granting of a discharge to the defendant.

Plaintiffs now sought to examine the defendant as to his property, on proceedings supplementary to judgment, and the defendant moved to stay the proceedings. The plaintiffs allege in their affidavit in opposition to the motion to stay such examination, that after their judgment was obtained they found defendant in charge of his store with his own name still on the sign, but with the word "agent" added; that he then refused to disclose who was his principal; that subsequently, after receiving his discharge in bankruptcy, the word "agent" was removed, and the business was seemingly conducted the same as before he was sold out by the sheriff and entered a court of bankruptcy. On these facts the plaintiffs claimed the defendant to have been guilty of *laches* in not interposing his plea, and applying for a stay during the pendency of the suit; and insisted that having thereby elected to give plaintiffs judgment, he cannot now interpose this decree to prevent an examination under that judgment.

BRADY, J.—Section 21 of the Bankrupt Law provides that "no creditor whose debt is provable under this act, shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined."

The discharge which was granted the defendant affects the plaintiffs' debt.

It is true that the section referred to contemplates an application by the debtor for a stay under its provisions, unless the creditor proves his debt, which operates as a stay, and that, in strictness, the defendant herein should have applied for such stay, but it was a matter of form of which the defendant himself cannot be supposed to have known. Ignorance of the law excuses not, it is true, but it bears upon the exercise of discretion, often with great force, when the mercy of the court is invited, and it will not in this case operate to the defendant's prejudice, but in a limited sense.

The failure of the defendant to disclose his principal may not prejudice the plaintiffs. He has been named in the proceedings in bankruptcy, and the plaintiffs may pursue him and recover their debt.

Whether this be so or not, the defendant will be relieved; but only upon payment of the costs in this action, which accrued subsequent to the filing of his petition, and ten dollars costs of this motion. I do not think the circumstances arrayed against the defendant warrant a refusal to relieve him.

Ordered accordingly.

UNITED STATES DISTRICT COURT—NEW JERSEY.

If the petitioning creditor in a case of involuntary bankruptcy desires to discontinue proceedings, and have his petition dismissed, he may do so before adjudication, without giving notice to other creditors of the alleged bankrupt.

Until adjudication, the only parties to the proceedings are the petitioning creditors and the debtor. The other creditors must file a new petition, or petition to be substituted under the last clause of the 42d Section of the Bankrupt Act.

Any creditor wishing to be so substituted must appear on the day to which proceedings have been adjourned, and on that day petition to be substituted.

When on such adjourned day the petitioning creditor does not "appear and proceed," and the understanding with the debtor is that such failure to appear shall be equivalent to a dismissal, and no other creditor appears to be substituted, the proceedings are at an end.

In re The Camden Rolling Mill Company.

Field, J.—A petition in bankruptcy was filed by The First National Bank of Camden, against The Camden Rolling Mill Company, on the 29th day of December, 1868. The rule to show cause was returnable on the 19th of January, 1869. On that day an answer was put in by The Camden Rolling Mill Company, denying the acts of bankruptcy set forth in the petition, and demanding a trial by jury. The proceedings were thereupon adjourned to the third Tuesday of April, that being the first term of the court at which a jury would be in attendance. The proceedings were further adjourned "from time to time, for good cause shown." The last adjournment

was to the 15th of June. On the 14th of June an agreement in writing was entered into between the petitioners and the Rolling Mill Company, by which the said company agreed to do certain things in consideration that the petitioner would, within thirty days from the date of the said agreement, cause the proceedings in bankruptcy to be discontinued or withdrawn without the payment of costs by either party to the other. No further proceedings in the case were had by any party until the 19th day of October, when, on motion of the attorney of the petitioner, it was ordered by the court that all further proceedings be discontinued, and that the petition be dismissed without the payment of costs.

On the 26th of October, on motion of William L. Dayton, Esq., attorney for The Naugatuck Railroad Company, alleging themselves to be creditors of The Camden Rolling Mill Company, a rule was granted to show cause why the said order of discontinuance should not be rescinded and set aside. This rule was made returnable on the 2d day of November, on which day counsel were heard on behalf of The Naugatuck Railroad Company, and also of the petitioning creditor. The ground upon which the court was asked to make the rule absolute was, that the petitioning creditor could not have the proceedings discontinued without giving notice to the other creditors of the alleged bankrupt.

After hearing the arguments of counsel, the court held that no such notice was necessary; that there was nothing in the Bankrupt Act to require it; that until the debtor was adjudged to be a bankrupt, the only parties to the proceedings were the petitioning creditor and the debtor; that the petitioning creditor had entire control of the proceedings, and could have them dismissed at his pleasure; and that the only right which any other creditor had was to file a new petition, or to ask to be substituted in place of the petitioning creditor under the last clause of the 42d Section of the act. The rule was, therefore, discharged.

A motion was then made by Samuel H. Gray, Esq., in behalf of other creditors of the alleged bankrupt, for a rule to

show cause why the said order of discontinuance should not be vacated and set aside as having been improvidently made, and that either party should have leave to take affidavits to be read on the argument of said rule.

These affidavits have been taken, and the case has been again argued with great ability by counsel on both sides. The only ground, so far as I can see, upon which the court is now asked to set aside the order of dismissal is, that there was some sort of an understanding between the petitioning creditor and the debtor, that the proceedings should not be discontinued without notice being given to the debtor; and the argument is, that if such notice had been given, he could have apprised his other creditors of it, and they would then have had an opportunity of applying to the court to be substituted in place of the petitioning creditor. And Mr. Middleton, the President and General Agent of the Camden Rolling Mill Company, does state in his affidavit that there was an understanding between the counsel of the petitioning creditor and himself, that the proceedings should not be discontinued without first consulting him.

But, in the first place, the existence of such an understanding is virtually irreconcilable with the admitted facts of the case; and in the next place it is expressly contradicted by the testimony of Mr. Vorhees and Mr. Browning, counsel for the petitioner. By the agreement of the 14th of June, to which Mr. Middleton was a party, it is expressly stipulated that the petitioning creditor is to have the proceedings discontinued within thirty days thereafter. There is no pretense that any notice to Mr. Middleton of such discontinuance was necessary. The next day, the 15th day of June, was the day of the last adjournment; and the counsel for the petitioning creditor supposed that by not appearing on that day the case would be in effect dismissed, and they so informed Mr. Middleton. It is true, that on the 19th day of October, a formal order of discontinuance was entered. Mr. Vorhees, the attorney of the petitioning creditor, thought no such order was necessary. Mr. Browning, his associate counsel, thought it would be better

that such an order should be made; and Mr. Vorhees testifies that on the 18th of October, the day before the order was made, Mr. Middleton came into his office, and asked him if the Bank was going to take any proceedings against them the next day, and that he told him the Bank would do nothing more against him except to discontinue the proceedings, and that he had been to Trenton on the Friday previous for that very purpose. The idea, then, of bad faith on the part of the petitioning creditor, or that proceedings were kept alive until they could place themselves in a more advantageous position, and were then discontinued without the knowledge of the debtor, and in such a way as to prevent the other creditors from availing themselves of the provisions of the 42d Section of the act, is wholly disproved.

If any other creditor wished to have himself substituted in place of the petitioning creditor he ought to have appeared on the day of the last adjournment; and then, if the petitioning creditor did not "appear and proceed," any other creditor "to the required amount," might have presented his petition, and the court would have proceeded to adjudicate upon it, "without requiring a new service or publication of notice to the debtor." On that day the petitioning creditor did not "appear and proceed," and the understanding with the debtor was, that this would be equivalent to a discontinuance. No other creditor then appeared and presented his petition, and the consequence was, that there was an end to all further proceedings. I do not see that the case is altered at all by the fact that on the 19th day of October, out of abundant caution, a formal order of dismissal was made and entered. Such order may or may not have been necessary, but it certainly cannot be said to have been improvidently made. If it was not necessary, then the proceedings were discontinued by the failure of the petitioning creditor to "appear and proceed" on the 15th of June, the day of the last adjournment. If it was necessary, the petitioning creditor was entitled to apply for it whenever he thought proper to do so, and he was not bound to give notice of the application to the other creditors. As I have said

before, they were no parties to the proceedings; and the only right they had was, in case the petitioning creditor did not appear and proceed on the day to which the last adjournment was made, to file their petition, and ask to be substituted in place of the petitioning creditor.

The rule to show cause is discharged.

SUPERIOR COURT—BUFFALO, N. Y.

The rule in bankruptcy, that a creditor, having security for his debt, is to be admitted as a creditor only for the balance of his debt, after deducting the value of his security, is not founded in the principles of equity.

The obligation of the debtor being the principal, and the pledge, the collateral or incident, the creditor has the right to resort to the debtor in the first instance, retaining the pledge for any deficiency, which he may be unable to collect of his debtor.

The rule, that one having a lien upon two funds, must so act as not to disappoint the just expectations of another having a lien on one of them only, is founded in social duty, and is never enforced to the prejudice of the double fund creditor.

Equity does not, upon the maxim that "equality is equity," deprive creditors of the fruits of diligence, but it favors and rewards diligence, and gives to creditors their full legal rights. And it does not treat those rights as varied by the accidents of insolvency, or of death.

Therefore, in the settlement of insolvent estates, equity allows the creditor to prove and take a dividend on his whole debt, without regard to any collateral security he may hold.

R., being insolvent, assigned all his property to the defendants "in trust, to convert the same into money, and divide the same equally among all of his creditors, in proportion to the amounts owing by him to them respectively." The property was only sufficient to pay about thirty-five cents on the dollar. The plaintiffs were creditors of R., and held stocks which he had pledged to them, amounting in value to about twenty per cent. of R.'s indebtedness to them.

Held, that the plaintiffs were entitled to a dividend upon the whole amount of their debt, without regard to the stocks pledged.

Jervis *v.* Smith.

This action was by Benjamin F. Jervis and Richard J. Sherman against James M. Smith and Charles J. Townsend, assignees of Edward S. Rich, in trust for the benefit of his creditors.

On April 12, 1867, Edward S. Rich, who carried on the business of an individual banker at the city of Buffalo, having

become insolvent, made a general assignment of all of his property to James M. Smith and Charles J. Townsend "in trust to convert the same into money and divide the same equally among all the creditors of the said Rich, in proportion to the amounts due and owing by him to them respectively."

Prior to the making of this assignment, Jervis and Sherman had become the sureties of Rich to the people of the State of New York, and also to the Erie County Savings Bank, for the payment of all money deposited by them respectively with said Rich; and the said Rich had pledged certain bonds and stocks with Jervis and Sherman to secure them as such sureties.

On June 15, 1866, Jervis and Sherman paid to the people of the State of New York, as the sureties of Rich, eleven thousand two hundred and fifty-nine dollars and sixteen cents, being the amount due from Rich at the time of said assignment for deposits made by the people of the State of New York.

Jervis and Sherman, as the sureties of Rich, also paid to the Erie County Savings Bank the following sums of money in satisfaction of the indebtedness of Rich to the bank at the time of said assignment, on account of deposits made by it with him:

1866, May 8	$2,000 00
1866, November 8	7,250 00
1867, May 8	2,088 47

The said securities pledged by Rich to Jervis and Sherman were sold on October 31, 1868, and produced four thousand five hundred and seventy-one dollars and thirty cents. It appeared also, that from the estate assigned by Rich to Smith and Townsend in trust, as aforesaid, the trustees would probably realize sufficient to pay to the creditors of Rich about thirty-five per cent. upon their demands.

On October 1, 1866, the said trustees declared a dividend of fifteen per cent., and on May 1, 1867, another dividend of ten per cent. upon the debts owing by Rich, and provided for by the assignment.

The said trustees have not paid the dividends upon the aforesaid indebtedness of Rich to the people of the State of New York and to the Erie County Savings Bank. They claimed on behalf of the other creditors of Rich, that Jervis and Sherman were entitled to have said dividends computed on the deficiency only, which would remain after an application of the collateral securities upon the debt; while Jervis and Sherman claimed that the dividends were to be computed on the whole debt with the right to use the collaterals towards the satisfaction of the balance that might remain.

This was the only question between the parties.

S. S. Rogers, for the plaintiffs.

John Ganson, for the defendants.

MASTEN, J.—In my examination of this case I have considered the rule (now statutory) which prevails in bankruptcy in England, and in this country, that a creditor, having security for his debt, is to be admitted as a creditor only for the balance of his debt, after deducting the value of his security. I have endeavored to ascertain the principles upon which a court of equity distributes the funds under its control, of an insolvent debtor, among his creditors, and administers the estate of a deceased insolvent debtor. And I have come to the conclusion that the rules of equity and the terms of the assignment work out the same solution of the question before me.

The rule in bankruptcy, above stated, had its origin in chancery, and probably in the doctrine of election. The Lord Chancellor, in the exercise of his summary powers over suitors and the commissioners of bankruptcy, long before any statutory provision, was accustomed to compel creditors to elect between the commission and the other remedies they might have for the recovery of their debts, and to stand to the election. And he restrained the commissioners from admitting a lien creditor, or permitting him to prove his debt, until he had exhausted his lien or security.

Subsequently the practice of valuing securities was adopted, to avoid delays.

The grounds upon which a lien creditor was compelled in bankruptcy to give up his security or to exhaust it in the first place, and admitted as a creditor for the deficiency only, are thus stated by Lord Eldon in *ex parte* Smith, 2 Rose, 63: "The reason is obvious: till his debt has been reduced by the proceeds of the sale, it is impossible correctly to say what the actual amount of it is; and with this further consideration, that in the event of any doubt attaching upon his right to retain the security, he is enabled in a contest with the rest of the creditors, to sustain his disputed title in a situation of predominant advantage."

From the reason first assigned, it would seem that the rule was one of practice, adopted for convenience rather than on any principle of equity. The reason secondly stated by Lord Eldon is difficult to be fully appreciated.

In *Greenwood* v. *Taylor*, 1 Russ. & M., 185, Sir John Leach, Master of the Rolls, expressed the opinion that the rule in bankruptcy had its origin in that principle of equity, which requires a creditor having a lien on two funds, upon one of which only another creditor has a lien, to first exhaust that fund upon which the single fund creditor has no lien. He applied the rule in the administration of the assets of a deceased insolvent debtor, and compelled a creditor having security by mortgage to deduct its value, and allowed him a dividend only on the balance of his debt. The decision clearly cannot be supported upon the ground on which it was put. For it compelled the creditor having the double fund to make an election prejudicial to his interests.

The plain and well-settled rule which compels one having a lien upon two funds, so to act as not to unreasonably disappoint the just expectations of another, having a lien on only one of them, is a rule of equity and benevolence. It inculcates and enforces the social duty of a creditor having an election to regard, in making his election, the rights of others, so far as it can be done without prejudice to himself.

The rule is enforced either by subrogation, or by marshaling the securities; and securities are never marshaled, when it will

trench upon the rights, or operate to the prejudice of the double fund creditor.*

In *Mason* v. *Bogg*, 2 Mylne & C., 443, the Lord Chancellor virtually overruled *Greenwood* v. *Taylor*. He remarked: "With respect to the principle of that case, it is to be observed that a mortgagee has a double security; he has a right to proceed against both, and to make the most he can of both; why he should be deprived of this right because the debtor dies insolvent, is not very easy to see." Upon inquiry, it was found that the rule laid down in *Greenwood* v. *Taylor* was in opposition to the practice in all of the masters' offices.

In *Bell* v. *Fleming* (*supra*) the Chancellor of New Jersey considered this question, although it was not directly before him. He showed that the decision in *Greenwood* v. *Taylor* could not be maintained upon the ground upon which it was put by Sir John Leach, but expressed the opinion that it could be on the maxim that equality is equity.

But equity favors and rewards diligence, and gives to creditors their full legal rights. No rule can be sound which treats those rights as varied by the accident of insolvency or of death.

The question before me has been judicially considered in several of the States.

In *Amory* v. *Francis*, 16 Mass., 308, the question came up in the administration of the estate of a deceased insolvent debtor. The court pronounced the rule in bankruptcy "just and equitable."

They say that by allowing the security creditor to receive a dividend upon his whole debt, "the creditor holding the security would, in fact, have a greater security than that pledged was intended to give him. For originally it would have been security only for a proportion of the debt equal to its value; whereas, by proving the whole debt and holding the pledge for the balance, it becomes security for as much more than its value,

* *Cheesebrough* v. *Millard*, 1 Johns. Ch., 409; *Brinckerhoff* v. *Marvin*, 5 *Id.*, 320; *Evertson* v. *Booth*, 19 Johns., 486; *Van Mater* v. *Ely*, 1 Beas., 271; *Bell* v. *Fleming*, *Id.*, 13; *Allston* v. *Munford*, 1 Brock. Marsh., 265; *Aldrich* v. *Cooper*, 2 Leading cases in Equity, 56, and notes.

as is the dividend which may be received upon the whole debt."

This reasoning seems to me to be based upon false premises, and to be illogical.

Ordinarily, the creditor holds the obligation of his debtor to pay him at a certain day, and receives the pledge from his debtor as security for the debtor's performance. The pledge may be insufficient, but it is as security for the full performance.

The debt or obligation of the debtor is the principal thing, the pledge the collateral or incident. If the debtor makes default, the creditor has the right of election as to his remedies. He may institute a personal action against his debtor upon his obligation, and by means of judgment and execution thereon collect his debt out of the estate of his debtor, or he may proceed to make his collateral securities available to the payment of his debt. The obligation of the debtor being the principal, the natural and usual course is to proceed against the debtor in the first instance by a personal action. The contract of pledge is made in view of this right of election as to remedies on the part of the creditor, which is certainly an important right when the security is insufficient. If the collateral securities have not, by some conventional act or intervening equity, become the primary fund for the payment of the debt, there is nothing in reason or natural justice which requires the creditor to proceed against the securities in the first place.

The Supreme Court of Massachusetts reaffirmed the doctrine of *Amory* v. *Francis* in *Farnum* v. *Boutelle*, 13 Metc., 159.

In *Rourtz* v. *Hart*, 13 Iowa, 515, the question arose under a general assignment for the benefit of creditors, and it was held upon the doctrine of double fund, that a creditor having security must exhaust it and be admitted to a dividend upon the deficiency only. It seems from the report that the question was not very much considered.

The question arose in *Putnam* v. *Russell*, 17 Vt., 54, and in *West* v. *Bank of Rutland*, 19 *Id.*, 403, in insolvency; in *Walker* v. *Barker*, 26 *Id.*, 710; *Moses* v. *Ranlet*, 2 N. H., 488, and *Findlay* v. *Hosmer*, 2 Conn., 50, in administration,

and in Schunks' Appeal, 2 Barr, 304, and *Logan* v. *Anderson*, 18 B. Monr., 114, under assignment for benefit of creditors; and it was held in all of these cases that a creditor having security is entitled to a dividend on his whole debt *pro rata* with the general creditors, and may retain his security for the deficiency.

I do not find that the question has been passed upon by the courts of this State.

In *Halsey* v. *Reed*, 9 Paige, 446, and *Besley* v. *Laurence*, 11 *Id.*, 581, the fund to which resort was compelled was the primary fund.

In Story, Equity Jur., 9 thed., Section 564, *b*, it is said, "We believe the general practice in the settlement of insolvent estates is to allow the creditor to prove his whole debt without any regard to any collateral security he may hold. If the dividend so reduces the debt that the collateral security will more than pay it, the personal representative is bound to redeem for the benefit of the general creditors."

I have arrived at the conclusion that this is the sound rule of law and equity.

In the case before me I think that the true construction of the assignment leads to the same conclusion. Rich had the right to make preferences, and to provide that creditors holding collateral securities should be admitted to a dividend on their whole debt or only upon the deficiency left after having exhausted the securities which they held.

At the time of the assignment the debt now due to Jervis and Sherman was due from Rich to the State of New York and the Erie County Savings Bank, to whose rights Jervis and Sherman have since succeeded.

The assignment directs that the assigned property be converted into money, and that the money "be divided equally among all the creditors of said Rich, in proportion to the *amounts* due and owing by him to them respectively."

Now, what was "the amount due and owing" by Rich to the State of New York and to the Erie County Savings Bank respectively at the time of the assignment? or, in other words,

for what amount could they have respectively recovered judgment against Rich? Why, plainly for the whole amount he owed them, without deduction on account of the securities in the hands of Jervis and Sherman. The securities had not been applied, either by agreement, or the act of either party, in part payment of the debt, and the interest or right of redemption of Rich in the securities passed to the assignees. The portion or interest in the assigned property which passed to the assignees in trust for the State of New York and Erie County Savings Bank, was fixed by the assignment upon its delivery.

I decide that Jervis and Sherman are entitled to dividends upon their whole debt, without deducting the securities held by them, or the proceeds thereof.

U. S. SUPREME COURT—TERRITORY OF NEW MEXICO.

A discharge will not be refused simply for the claim that publication of the notice of the assignee's appointment was omitted to be made.

In re WILLIAM S. STRACHAN.

FRANZ and Charles Huning are the only creditors who appear and oppose discharge of petitioner, specifying that their opposition is on account of—1st. That notice of appointment of assignee was not published. 2d. That the petitioner fraudulently and willfully preferred one of his creditors.

Opinion of the court, by JOHNSON, A. J.—The first specification does not show any valid cause for withholding petitioner's discharge. Section 14 of the Bankrupt Act requires the *assignee* to publish notice of his appointment, but the act does not make such publication one of the conditions on which the discharge shall be granted.

The act requires certain things to be done by the bankrupt petitioning to be declared a bankrupt, making a schedule of what he owes and what is owing to him, and of his personal and real estate; and thereupon his control of his assets ceases, and becomes vested by law in the Register in bankruptcy, and they are by him transferred to assignee or assignees, in election

of whom the bankrupt has no voice, and over whose acts in the premises the law assumes entire and exclusive control. Hence the proposition in the argument against the discharge of the petitioner, that "it was his duty to see that the assignee published notice, and to complain of him to the court in case of his neglecting to do so," seems very illogical, and if affirmed by the court, would throw responsibilities and burdens upon the person who has delivered up all he was worth in payment of his debts, which should in every respect pertain to those having *the legal interest* in the distribution.

Evidence sustaining the second specification has not been presented to the court; the transcript offered, not being perfect, is inadmissible as evidence.

And now, this petitioner having done and performed all matters and things required by law, and obeyed the orders of this court in the premises, his final discharge, as prayed for, must be granted.

R. H. Tompkins, for bankrupt.

Henry Hilgert, for opposing creditors.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Debtors, merchants, knew themselves to be insolvent, but represented to creditors on debts past due that they were solvent. The creditors, however, exacted as security a chattel mortgage, dated May 9, 1868, on a large portion of debtors' goods, and on a failure to receive payment of an installment thereunder, took possession on the 15th of July, 1868, under the mortgage, sold the goods, and applied the proceeds. Thereafter, on August 3, 1868, debtors filed petition in bankruptcy, and were duly adjudged bankrupts. Assignee in bankruptcy brought action against the creditors to recover the value of the goods so sold.

Held, said mortgage was within the meaning of Section 35 of the statute, made by the bankrupts with a view to give a preference.

The creditors had reasonable cause to believe that their debtors were insolvent when the mortgage was made, and it constituted a fraudulent preference.

Judgment in favor of plaintiff.

In re FREDERICK E. DRIGGS, *Assignee of* TONKIN & TREWARTHA, *Bankrupts*, *v.* MOORE, FOOTE & Co.

WITHEY, J.—Tonkin & Trewartha, of Eagle Harbor, in the

Upper Peninsula of Michigan, being indebted to defendants, merchants of Detroit, for merchandise, and also on a claim transferred to them in favor of Allan Shelden & Co., amounting in the aggregate to about twelve thousand dollars, on the 9th of May, 1868, to secure the payment thereof, executed to defendants a chattel mortgage on all or nearly all their personal property, including two stocks of goods at Eagle Harbor. To induce the giving of the mortgage, defendants extended time for payment, so that the first payment of eight hundred dollars would come due July 1st, after the date of the mortgage, and a like sum monthly thereafter, until the whole sum of twelve thousand, with interest, should be paid. On the 15th of July, the first installment not having been paid, defendants took possession of the mortgaged property, and a few days after sold the same at public vendue. On the 3d of August, Tonkin & Trewartha filed a petition to be declared bankrupts, and were afterwards duly adjudged to be such. Their assignee, the complainant, files his bill against defendants to recover the said mortgage, alleging that the mortgage was made within four months before the petition in bankruptcy; that Tonkin & Trewartha, at the date of the mortgage, were insolvent; that it was made with a view to give a preference, and that defendants had reasonable cause to believe their debtors insolvent, and the transaction to be in fraud of the provisions of the Bankrupt Act. The giving of the mortgage, and the then insolvency of Tonkin & Trewartha, are admitted by the defendants, but they deny that their debtors made the mortgage with a view to give a preference, and deny that defendants had reasonable cause to believe their debtors insolvent, or that the mortgage was made in fraud of the provisions of the Bankrupt Law.

The bill of complaint presents a case under the first provision of Section 35, viz.: Of a transfer with a view to give a preference; and it is urged by defendant's counsel that this provision is not within the operation of the third paragraph of the section, which declares: "And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary

course of business of the debtor, the fact shall be *prima facie* evidence of fraud."

The question is, what "sales, assignments, transfers, and conveyances" are referred to in the clause just read? It follows two provisions, the first of which declares that "any payment, *pledge*, assignment, transfer, or conveyance," made within four months by the insolvent debtor, "with a view to give a preference," etc., shall be void; the second, that "any payment, *sale*, assignment, transfer, conveyance, or other disposition," within six months, by the insolvent debtor of his property, "with a view to prevent his property from coming to his assignee in bankruptcy," etc., shall be void.

It was said of the argument, the clause as to what shall be *prima facie* evidence of fraud, does not refer to the first provision; among other reasons, because the word "pledge" is not in the fraud clause, and *is* in the first provision; and so the word "sale," employed in the second provision, but not in the first, is used in the third, or fraud clause. The same reasoning would prevent the third paragraph from applying to either of the former provisions; for the word "payment," employed in both of them, is not used in the fraud clause, and the words "other disposition," employed in the second paragraph, are not in the third.

The words "sale, assignment, transfer, or conveyance," employed in the third paragraph, are of comprehensive import, and embrace almost every disposition of property, whether absolute or conditional. Both the antecedent paragraphs refer to and are designed to protect the property of the insolvent, and the clause as to fraud is also designed to the same end. All these provisions relate to the same subject or thing, viz.: the property—and all three aim to protect property of insolvents from fraudulent disposals. My conclusion is in harmony with the rulings in the courts of bankruptcy, so far as decisions have come under my notice; and with the opinion of the Supreme Court of Massachusetts in reference to a like provision in the insolvent laws of that State.

When, therefore, it was shown in this case, that Tonkin and

Trewartha were insolvent, and gave a chattel mortgage of their goods to secure a debt which they owed, there was established a case of fraud *prima facie*—for that mode of transfer by a trader of his goods, is not one in the usual and ordinary course of his business, but is unusual and exceptional.

We are now to inquire whether the mortgage was made with a view to give a preference to defendants. Whether it was, rests upon the facts, and I refer to Trewartha's testimony first. He says: "I knew"—May 9, 1868, the date of the mortgage —"if we were called upon to pay all our indebtedness at the time, it would be impossible to do so; our only hope was to continue in business, and by using profits yet to be made, we might pay our debts."

Next, Mr. Tonkin testifies: "In March, 1868, on reviewing the state of my business, I felt that if demands were pressed upon me for all the debts I owed, I should fall far short of paying them." And they say they were averse to giving a mortgage to defendants, they did so only when pressed, and becoming satisfied it was their only way to ward off the blow which threatened their business,

Mr. Maynard went from Detroit to Eagle Harbor in May, and obtained from Tonkin and Trewartha the mortgage on their goods, as the agent and attorney of defendants. He testifies: "Trewartha said he did not see why we wanted securities, as he had given me a full statement of their standing, and that we could see that they had a surplus of between twelve and thirteen thousand dollars. I said to him, that in case security was given, I should be willing to fix the time and amount of payments to be made to suit their convenience." He then states that Tonkin "expressed some dislike to giving a chattel mortgage," and "wanted to know if they could rely upon the defendants giving them additional credit in case they should execute the mortgage. I informed them they could."

Now, it turns out that the statement which Tonkin and Trewartha made of their standing to Mr. Maynard, at the time of giving the mortgage, was not truthful; that in fact they owed more than their assets amounted to. They covered up their

real condition by a false statement, well knowing the result if their true condition was made known. It may be true that they hoped to work out, and one means to that end was to obtain time in which to pay their debts. The learned counsel for defendants claim that Tonkin and Trewartha's view was not to give a preference, but to gain time, and, from profits to be realized from trade, pay their debts; that while the mortgage has operated to give defendants preference, it is because of the failure of the mortgagors to realize their hopes and expectations, and is but an incident, and was not the object of the mortgage. It is said, too, their reluctance and aversion to giving a mortgage is evidence that they did not give it with a view to a preference.

If we pause and ascertain, first, that the mortgagors knew they were utterly insolvent; that they had large indebtedness past due these defendants and others, which they were wholly unable to pay, and that, bad as their credit was before giving the mortgage, it would be utterly gone after executing it, with every one who should know of its existence—and that its existence would be open to all in the Town Clerk's office—there would seem no escape from the conclusion that Tonkin and Trewartha must have known and realized, that a mortgage to defendants of their property would be a preference. It is wholly untenable to say, that traders who know themselves to be insolvent, can mortgage their property to secure a pre existing debt, without entertaining the view that such action is a preference. The court is to judge of the transaction from Tonkin and Trewartha's standing at the time, and if it appears that their condition was such that a mortgage must operate as a preference, it cannot be allowed; that because there was a possibility of their earning in the future enough to pay all their debts, and hoped so to do, that, therefore, there was no intention or view to give a preference.

It matters not what was their principal motive, if they were actually insolvent and knew it, they will not be allowed to pledge all their property or any part of it to one creditor, leaving the other creditors dependent, in whole or in part, upon the

trader's subsequent good or ill fortune in business enterprises. The court regards this view to be in harmony with the spirit and intention of the Bankrupt Act; any other view renders the provision of the law under consideration as worthless as a rope of sand, and as opening a door to evade one of the most salutary provisions of the Bankrupt Act.

Mr. Justice Swayne, in *Farrin* v. *Crawford et al.*, 2 N. B. R., 602, used the following language: "Assuming, then, that he (the debtor) was insolvent and knew it, it follows at once, that any payments then made by Farrin to any creditor in full, were with intent to prefer, and therefore acts of bankruptcy within the meaning of Section 39." Section 39 employs the same language as Section 35, viz.: "with a view to give a preference." Hence the ruling of Mr. Justice Swayne is applicable to the case at bar. The court holds the mortgage by Tonkin & Trewartha to defendants to have been made with a view to give a preference.

And the question remains, whether defendants had reasonable cause to believe Tonkin & Trewartha insolvent, and that the mortgage was made in fraud of the provisions of the Bankrupt Act. This is frequently one of the most difficult, as it is one of the most important questions arising under the law, involving, as it often does, large amounts growing out of payments, mortgages, and transfers by a debtor, and involving questions of construction and fact. Perhaps no precise rule can be laid down which will be applicable to all cases, inasmuch as the determination of each case rests largely upon its own peculiar facts. It is generally held by the Bankrupt Courts, that a trader who is not able to pay all his debts in the usual and ordinary course of business, as persons carrying on trade usually do, is insolvent within the meaning of the Bankrupt Laws, and I know of no better general rule by which to be governed in considering the facts of a case. It is neither too broad nor too narrow; while, in my opinion, it would be quite too narrow and restricted, to hold that failure to pay *some one debt when due*, is evidence of insolvency in all cases under the act, though I believe it has been held, that if a trader

does not pay a debt when it matures, he is to be regarded insolvent. This, *as a rule*, applicable to traders generally in this country, I cannot indorse. Whether a single instance of non-payment of a debt at maturity would be evidence in a given case of insolvency, depends somewhat upon the magnitude of the debt, upon the locality of the debtor, and upon what is the ordinary course of business and custom in that respect of the locality where the debtor resides, and upon such other facts and circumstances as will bear upon the question of insolvency.

Suppose a debtor residing in a small country town, in an agricultural district, or in the mining regions of this State, where debtors are not usually prompt to meet their debts as they mature, and an item of indebtedness is not paid at maturity, while at the same time the debtor is of known responsibility, having two dollars or ten dollars of assets to one dollar of indebtedness, and enjoying good credit—to say such debtor is insolvent simply because he fails to pay the debt at its maturity, is obviously incorrect. It ignores the usage and course of business recognized between the creditor and debtor class in that locality, and would present the spectacle of the mercantile class saying a trader is solvent, and the courts saying he is insolvent; whereas the courts, upon such questions, should adopt the mercantile usage as the rule of decision. The question is, whether the debtor or trader is able to pay his debts in the ordinary course, as persons carrying on trade there usually do. Hence it may be, and undoubtedly is true, that insolvency in New York, Boston, Philadelphia, and other commercial centers, is not insolvency in small country towns.

In the former places, if the debtor's paper is dishonored, his credit is gone, and he is *prima facie* insolvent; whereas in the latter localities it is not so. Insolvency is a fact, and not a matter of definition or rule of law, as was said at the argument; and what is evidence of insolvency in London, or Paris, or New York, is not evidence of insolvency everywhere.

The rule first stated, that a trader who is not able to pay all his debts in the usual ordinary course of business, as persons carrying on trade usually do, is to be regarded insolvent, is

sufficiently liberal to admit all the necessary tests in determining the question of insolvency.

What now are the facts from which we are to draw our conclusions, whether the defendants had reasonable cause to believe their debtors insolvent at the time Tonkin & Trewartha made the mortgage, May 9, 1868?

Defendants commenced selling to the bankrupts goods on credit in 1866, and continued up to about November 10, 1867, when they sold the last bill prior to the mortgage. Then Tonkin & Trewartha owed defendants an amount, past due, of two thousand five hundred dollars. The November purchase added to the indebtedness three thousand seven hundred dollars, and Tonkin & Trewartha also gave defendants, at that time, their draft for five hundred dollars on Head & Perkins, of Boston, at ten days, which was never paid. Tonkin & Trewartha at that time gave defendants their six notes for eight hundred and seventy-five dollars, due monthly thereafter. There was also five hundred and ninety-nine dollars in account, falling due December 7; total indebtedness, six thousand three hundred and forty-nine dollars. They also purchased from Allan Shelden & Co., of Detroit, and were indebted to them for merchandise, at the same time, four thousand six hundred dollars. They gave Allan Shelden & Co. a draft for five hundred dollars, at ten days, on the same parties as the draft to defendants, which was not paid. The indebtedness to Allan Shelden & Co. also came due monthly.

We may presume that the November credit was induced largely by a statement made by Tonkin & Trewartha, in October previous, showing assets, thirty-nine thousand dollars; liabilities, eighteen thousand dollars; surplus, twenty-one thousand dollars. But it appears that on the 9th of January following, defendants had received no payment from their debtors, and learning there was a mortgage on the stock to Chicago parties to secure the payment of seven or eight thousand dollars, became solicitous about their debt, and wrote Hubbell & O'Grady, attorneys at Houghton, inclosing a statement of their debt, with that of Allan Shelden & Co., and also of J. J. Bag-

ley, in the aggregate amounting to over twelve thousand dollars. In their letter of instructions appears the following: "We wish you to go at once to Eagle Harbor and examine closely into their affairs, and in the first place, see if their statement made accords with their condition. We don't want to break them up if they can go through, nor do we want to jeopardize our claims by waiting until every one else has their claim secured or paid. Please be particular, and see what shape the debt was in that they gave chattel mortgage for—as we think the Bankrupt Act would force them in to take *pro rata* with other creditors, if Tonkin & Trewartha could not pay in full. But if statement made by Tonkin when here was true, they must be solvent.

"After looking into their matters, we want you to take such steps with inclosed claims as in your judgment may seem best for our interests."

The October statement was sent to Hubbell & O'Grady, as a guide to their investigations, and January 20, Mr. O'Grady wrote defendants, "I am happy to inform you that their matters are sound, in my best judgment."

Now, Tonkin & Trewartha state their assets at fifty-two thousand dollars; liabilities, twenty-five thousand and thirty-one dollars; and Mr. O'Grady writes, if two thousand dollars are deducted from accounts—calling them three thousand dollars—and ten thousand dollars are deducted for excessive estimate of stock, "this leaves them nearly fifteen thousand dollars ahead."

He reports as incumbering their merchandise a mortgage for eight thousand dollars, dated October, 1867, payable one thousand dollars monthly, on which fifteen hundred dollars only was paid; and another mortgage given December 24, to secure three thousand two hundred dollars, on which five hundred dollars was unpaid, and due forty days from date of mortgage. This mortgage, he states, was given to prevent their goods being attached for a bill bought in November.

Tonkin & Trewartha's statement, transmitted to defendant by Mr. O'Grady, omitted indebtedness upon the two five hun-

dred dollar drafts before alluded to, and this was noticed by defendants, and Mr. O'Grady's attention called to the fact, who accounted for the omission as inadvertence on Tonkin & Trewartha's part. He says, in his reply, "I have set a good, careful, and vigilant watch upon the concern."

One of defendants, having in charge this business, Mr. Bagley, testifies that when he received Mr. O'Grady's statement, he believed Tonkin & Trewartha were sound. Early in March defendants procured Mr. Hoar, a man of mercantile experience at Houghton, to go to Eagle Harbor and look after their debt.

On the 29th of February, defendants purchased Allan Shelden & Co.'s debt against Tonkin & Trewartha, at fifty cents on the dollar; most of it was past due; so that in March defendants held about twelve thousand dollars of Tonkin & Trewartha's indebtedness.

Mr. Hoar testifies that, after looking into their affairs, and making inquiries of them, he was satisfied Tonkin & Trewartha were good. He so reported to defendants, and stated their assets over liabilities at twenty thousand dollars. Mr. Chadburn accompanied Mr. Hoar in the interest of defendants, and his testimony accords with that of Mr. Hoar.

The next step is in the early part of May, 1868, when defendants, being without remittances from their debtors, procured their attorney, Mr. Maynard, of this city, to go to Eagle Harbor and look after their debtors' standing.

Mr. Bagley testifies that his instructions to Mr. Maynard were, "If they were sound, not to disturb them, but give them all the time they wanted; if they would give security we would carry them through—means by that we would give them goods until they were able to turn themselves and pay their debts."

Mr. Maynard testifies that defendants "expressed to him a good deal of anxiety about the claim," and wished him to go to Eagle Harbor and examine into Tonkin & Trewartha's pecuniary condition, and do whatever he thought best for their interests.

If satisfied they were good, with sufficient means to pay what they owed, and go along in business, time might be given them, and defendants would give them additional credit, provided security was given to pay defendants' bill. Mr. O'Grady, of Houghton, accompanied Mr. Maynard from that point. Both agree substantially as to what was said and done.

Arriving at Eagle Harbor, inquiry was made of resident parties concerning the condition of Tonkin & Trewartha, and they were told that while trade was dull, the parties were regarded sound, and that any statements they might make concerning their standing and affairs could be relied upon.

Tonkin & Trewatha now made their last statement before executing the mortgage, and it exhibited: assets, thirty-one thousand seven hundred and four dollars; liabilities, eighteen thousand eight hundred and seventy-six dollars; assets over liabilities, twelve thousand eight hundred and twenty-eight dollars. They were urged to give defendants security, but said in reply, "They were perfectly good, and could pay every dollar they owed as soon as they could convert their property into money, and would have a handsome surplus left."

Mr. Maynard says: "I answered that to go along successfully with their business, and meet their liabilities from the sale of their goods and the collection of their accounts, they would require a long extension on at least a portion of their indebtedness, and that they would necessarily need additional credit; and that inasmuch as our claim comprised nearly two-thirds of their entire indebtedness, I thought it not unreasonable to ask security. I said to them that in case security was given, I should be willing to fix the time and amount of payments to be made to suit their convenience." Thus the business was talked up, and, therefore, we obtain the views of the parties, and a pretty good understanding of how defendants regarded the debtors' standing and prospects when the mortgage was given.

Mr. Allan Shelden testifies that defendants said they wanted to buy Allan Shelden & Co.'s demands against Tonkin & Trewartha, because their debt was past due, and they desired to

control both; thought their debtors good, and could collect. Mr. Shelden further says, about the time they transferred their claim to defendants, February 29th, the failure of Tonkin & Trewartha to pay was a subject of conversation between them and defendants. He also says they sold their debt, amounting to four thousand six hundred and fifty dollars, for fifty cents on a dollar, because they considered the debt doubtful, and concluded they would rather take that than take the risk. Now, we must remember that Allan Shelden & Co. and defendants were alike conversant with Tonkin & Trewartha's statements, and both experienced business houses.

July 1st, the first of the notes secured by the mortgage came due, and was not paid. Mr. Bagley arrived at Eagle Harbor just before the middle of the month, and caused the mortgage to be enlarged to cover accessions to Tonkin & Trewartha's stock, amounting to about two thousand dollars, of which six hundred dollars were purchased from defendants in June on credit.

Mr. Bagley testifies: "Their statement then made (in July, when he arrived at Eagle Harbor) was different from the statement made before; I was satisfied there was a leak, or that they hadn't the assets they represented to me they had; I made up my mind it was no object to go on and advance four thousand or five thousand dollars more goods, and I took possession of the stock." An inventory was now taken of the property covered by the mortgage, which amounted to seventeen thousand three hundred and eighty-four dollars. On a sale this property brought ten thousand two hundred and seventy-six dollars. The only other fact I deem it important to state is, that it appears in evidence that it is a common occurrence for traders in the Lake Superior region to fail in paying their debts at maturity.

Such are the principal and controlling facts of this case, and now the question recurs, had the defendants reasonable cause to believe their debtors insolvent?

The several statements put in evidence, furnished by Tonkin & Trewartha to defendants, are important in the consideration of this question.

The one made in October, 1867, represented twenty-one thousand dollars assets over liabilities; that of January following, represented twenty-six thousand nine hundred and sixty-seven dollars; Mr. Hoar, who investigated the condition of the bankrupts in March, reported twenty thousand dollars; and that made to Mr. Maynard and Mr. O'Grady, when the mortgage was taken in May, exhibited not quite thirteen thousand dollars of assets over liabilities. All these statements were made within a period of seven months.

Tonkin & Trewartha were surrounded by, and mostly dependant upon a mining population for trade. Mining operations were not active during the winter of 1867–8—copper was low, and business much depleted—and Tonkin & Trewartha's trade had been very light during that winter. The facts were understood by both debtors and creditors.

In the light of these facts, let the four statements of the debtors be examined; and we must assume that defendant did not fail to notice the discrepancies.

Between the October and January exhibits—about three months—there was shown to have been gains of nearly six thousand dollars, and yet in the time not a dollar paid to Allan Shelden & Co. or defendants, that I can discover, and certainly nothing after November 10th. Besides, trade was dull.

The March statement exhibited a shrinkage since January 20th, of nearly seven thousand dollars. I think defendants, in view of such varying statements, might well question the correctness of such exhibits, and feel exceedingly anxious concerning their debt, when, about the first of May, they sent Mr. Maynard to Eagle Harbor.

Again, Mr. Maynard and Mr. O'Grady must be presumed in possession of the facts to which we have referred, at the time of their visit to Tonkin & Trewartha. Now, the statement made showed assets over liabilities between twelve and thirteen thousand dollars, and compared with the last preceding statement of March, the shrinkage was more than seven thousand dollars — in about two months — while, by a com-

parison with the January statement, the assets of Tonkin & Trewartha had shrunk over fourteen thousand. Taken in connection with other facts, I regard these statements sufficient to afford reasonable evidence to an impartial judgment that Tonkin & Trewartha's solvency was to be distrusted—quite as much in May as in July following. That there was reason to believe them insolvent in July, is admitted by Mr. Bagley, one of the defendants. He says, when he arrived at Eagle Harbor in July, "*Their statement then made, was different from statement made before, and I was satisfied that there was a leak, or that they hadn't the assets they represented to me they had.*"

If a difference between the July statement and former statements was cause to conclude Tonkin & Trewartha had not the assets they represented themselves to have, then the difference or discrepancy between previous statements, afforded equal ground to regard them not as good as they represented.

When Mr. Bagley went to Eagle Harbor in July, it does not appear that he made any detailed examination of the debtors' condition before taking possession of the stock under the mortgage; but on seeing and talking with them, became satisfied from the statement then made, that they were no longer able to pay their debts. I can discover nothing in the testimony to justify the conclusion that Tonkin & Trewartha were less able to pay than at the time the mortgage was made, except the single fact that they had now failed to make the July payment of eight hundred dollars on the mortgage.

As early as February 29th, Allan Shelden & Co. realized the doubtful responsibility of Tonkin & Trewartha by selling to defendants their debt for fifty cents on a dollar. Is it probable that they would have done this if they had regarded Tonkin & Trewartha solvent? Do business men dispose of their bills receivable against solvent debtors at fifty cents on a dollar?

There is, to my mind, exhibited by the facts in this case very strong reasons for defendants not only to have suspected, but believed their debtors insolvent, outside of the consideration

that there was other past due indebtedness of considerable amount.

Defendants did feel extremely anxious as to the ultimate payment of their debts, as is shown by the evidence. That they distrusted Tonkin & Trewartha's solvency is apparent from their sending on three different occasions agents and attorneys to investigate their debtors' standing; also, from information received that there had been placed on the debtors' stock, two mortgages for considerable amounts; and again, from the fact that defendants were not only anxious to obtain security for their debt, but did not rest satisfied until it was accomplished.

Now, considered in relation to their own past due debt, it would seem to be the policy of the Bankrupt Act not to allow a creditor, under any circumstances, to take a transfer of a debtor's property by way of preference, payment, or security.

Transfers made in the usual and ordinary course of a trade's business, or payments made at the time a debt matures, and in the usual mode of paying debts, are *prima facie* valid. On the other hand, whenever a creditor is in possession of such facts and circumstances in reference to his debtor's standing as arouses suspicion with regard to his solvency or ability to meet his indebtedness, the creditor is so far put upon inquiry that he will not be allowed to shut his eyes to those facts and circumstances, and obtain payment of a debt, otherwise than as it matures, or take security or a transfer of property from the debtor to the prejudice of other creditors.

If he does so and his debtor comes into bankruptcy within four or six months, as the case may be, the creditor must be held to have had reasonable cause to believe his debtor insolvent, and that the transfer was in fraud of the provisions of the Bankrupt Act. Any other view detracts greatly from the most wholesome operation of the law. Not paying debts in the usual and ordinary course of a trader's business from lack of present means and want of ability to raise means, must be regarded as *prima facie* evidence of insolvency, and the creditor who has knowledge of such facts must act in view of them. It is undoubtedly true that defendants and their agents and at-

torneys had no idea of the utterly insolvent and bankrupt condition of their debtors, as the proofs now show their debtors' condition to have in fact been. But we must not forget that there is a clear distinction between insolvency and bankruptcy. A trader may be insolvent and yet not be bankrupt.

There is one view of this case which settles the question we are discussing, and it is this: Tonkin & Trewartha were largely indebted, most of it past due, and they professedly wholly unable to meet that indebtedness or any considerable part of it, in the usual course of business, as those debts matured, and this known to defendants. Tonkin & Trewartha were not only unable to pay as their debts matured, but confessedly unable to do so within a reasonable time, either from present means, or through the aid of their credit and property, which solvent men are usually able to do.

They were not, in May, and for months before had not been, able to pay their debts past due. They were pressed from time to time for payment or security, and month after month continued to dishonor note after note as they matured. Their condition was such as to cause their pecuniary standing to be discussed by their creditors, and their over-due and unmatured paper to sell at fifty cents on the dollar.

This state of things betokens, beyond any chance of mistake, not only that Tonkin & Trewartha were insolvent within the rule of not being able to pay their indebtedness as it becomes due, in the usual and ordinary course of their business, but, as all this was known to defendants, that they had reasonable cause to believe their debtors insolvent when the mortgage was made; not that they *believed*, but had *reasonable cause* to believe. It follows, as a necessary inference, that a mortgage made under such circumstances was a fraud upon the provisions of the Bankrupt Act.

Having already found that the mortgage was made with a view to giving a preference, it follows that there must be a decree in favor of complainant for the value of the property taken by defendants.

I shall adopt the amount brought on sale as the fair value.

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This state of things betokens, beyond any chance of mistake, not only that Tonkin & Trewartha were insolvent within the rule of not being able to pay their indebtedness as it becomes due, in the usual and ordinary course of their business, but, as all this was known to defendants, that they had reasonable cause to believe their debtors insolvent when the mortgage was made; not that they *believed*, but had *reasonable cause* to believe. It follows, as a necessary inference, that a mortgage made under such circumstances was a fraud upon the provisions of the Bankrupt Act.

Having already found that the mortgage was made with a view to giving a preference, it follows that there must be a decree in favor of complainant for the value of the property taken by defendants.

I shall adopt the amount brought on sale as the fair value.

This was ten thousand two hundred and seventy-six dollars, from which is to be deducted the mortgage lien on the property paid by defendants, eighteen hundred and twenty-five dollars, the remaining sum, with interest thereon to this date—one year and seven months—being nine hundred and thirty-six dollars and sixty-four cents, gives the amount of the decree—nine thousand three hundred and eighty-seven dollars and sixty-four cents.

Mr. Pond and *Mr. Griggs*, for complainant.

Mr. Lothrop and *Mr. Meddaugh*, for defendants.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where counsel, representing certain creditors, objected to the votes of other creditors being received for choice of assignee, on the ground that one had accepted a preference, and the claims of others had been purchased with the bankrupt's money, opposing counsel offered contrary proof which the Register declined to hear, an injunction order having been produced by first counsel.

Held, that the Register was right. The Register has power to postpone proof of a claim until an assignee is chosen, if a case is made out for such postponement within Rule 6 of this court; but he has no power to institute or set on foot the inquiry provided for by the last clause of Section 22 of the act.

In re ADOLPH B. HERRMAN AND HERMAN HERRMAN.

I, the undersigned, one of the Registers of this honorable court, do respectfully certify that, upon the first meeting of creditors, I proceeded to take the votes of all the creditors, reserving, by consent of the meeting, all objections until the close of the voting, and also the right to strike out the votes of those whose proofs should be postponed. The vote stood twelve votes, representing seventy-three thousand two hundred and five dollars and nine cents, for William H. Rooney, and seventeen votes, representing fourteen thousand two hundred and twenty-five dollars and sixty-three cents, for David W. Evans.

Mr. Seixas, of counsel for certain creditors, then proceeded, pursuant to the understanding aforesaid, to object to the vote of Solomon Reich, and read an affidavit tending to show that

said Reich had accepted a preference contrary to the act. After hearing Mr. Mackie, of counsel for certain other creditors, in opposition thereto, I came to the conclusion that there was reasonable doubt of the right of said Reich to prove his claim, and was of the opinion that such right ought to be investigated by the assignee, and pursuant to the understanding aforesaid, struck out said vote. Mr. Seixas then proceeded to object to the vote of Isidore Rosenthal, Simon Fox, Rawitzer Brothers, Adolph Rawitzer, and Edward Nathan, and read several affidavits, letters, papers, and documents, to show that the claims of the said creditors had been purchased with money belonging to the bankrupts, and in collusion with them, in fraud of the Bankrupt Act. Pending the examination of the case, the hour of adjournment having arrived, the meeting was adjourned to Wednesday, the 9th instant. At the appointed time the meeting proceeded, when Mr. Seixas produced a certified copy of an order, and an injunction founded thereon; whereupon Mr. Mackie stated that he had affidavits of the several creditors whose votes were objected to by Mr. Seixas, and others which he had intended to read in opposition to the objection to the proving of their claims. He also produced Edward Nathan, one of said creditors, and offered him for oral examination. I declined to hear them or permit them to be read or given, holding that the question was disposed of by the order and injunction above referred to. Mr. Mackie then proceeded (pursuant to the understanding under which the vote was taken) to object to the votes of Jacob Foss, Alexander Ross, Felix McCabe, Owen Ward, Ingersoll & Dougherty, William Kelly, The Cleveland Paper Company, Murphy & Son, M. Urspring, John W. Winegar, John Beaman & Co., and Jessup & Moore, stating the grounds on which such objections were founded, and offering proof to support the same. I declined to hear said objections, or the proof supporting them, holding that the court had, in the making of the order and granting the injunction aforesaid, indicated a different practice—to wit: the practice of presenting such objections by petition to the court, and obtaining an order and injunction restraining such

creditors from voting. Whereupon, after striking out the votes of the creditors named in said injunction order, the said Evans was found to have been elected, and I so declared, to all of which Mr. Mackie excepted, and desired the same to be certified to the court for decision.

In submitting the views of the Register pursuant to the rules of this court, it is submitted that the view taken in the case of *Noble*, 3 B. R., p. 25, should undergo some modification. The questions presented by objections of this character go, in effect, only to the right of voting upon the election of an assignee before the Register. Such objections must be disposed of on the spot, otherwise they are utterly idle. The Register should listen to them, and if a *prima facie* case is made out, he should postpone the proof of the claim till the assignee is chosen. If the court should be of this opinion, this case must, of course, be remitted to the Register, with directions to hold another election. I beg to say, further, that I was not aware, at the time of the meeting, of the decision in the Northern District in *re* Pearson, 2 B. R., 151. Adopting the practice there suggested, it would clearly be the duty of the Register to first call the names of the creditors entitled to vote, and dispose of any objection to his voting before receiving his vote. Such a course will, in future, be adopted by me, unless the judge of this district should indicate a different practice.

Dated this 16th day of March, 1870.

Respectfully submitted,

I. T. Williams.

Blatchford, J.—The order made by me on 8th instant, was made because it was stated to me by the attorney who applied for it, that the Register doubted his power to make it. The case of *in re* Noble, 3 N. B. R., 97, was called to the attention of the attorney by me, with the statement that my understanding of it was that the Register in that case being the same Register as in this, expressly stated in his certificate that he had power to inquire into the right of creditors to vote, for the purpose of postponing the proof of claims until an assignee

should be chosen, pursuant to Section 23. I also called the attention of the attorney that, by Rule 6 of this court, it is expressly provided that if the Register entertains doubt of the validity of any claim, or of the right of a creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen. But the attorney stated that the Register, notwithstanding that rule, doubted his power to do what I state above I understand him, in his certificate in the case of Noble, to say he has power to do. I understand the case of Noble to mean that the Register has power to postpone proof of a claim until an assignee is chosen, if a case is made out for such postponement within Rule 6 of this court; but that, beyond that, the Register has no power to institute or set on foot the inquiry provided for by the last clause of Section 22 of the act. I did not intend, by granting the order made in this case, to institute any new practice.

Let an order be entered in this case for a new election of assignee, and setting aside the former election.

The clerk will certify this decision to the Register, Isaiah T. Williams, Esq.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Witness, who is called as an expert, has passed his direct examination, showing that the debtor has falsified some of his books of account, etc. On his cross-examination he refused to answer questions irrelevant to the matter at issue, claiming the protection of the Register, and pleading that a truthful answer would bring upon him moral turpitude, or would tend to degrade and humiliate him. The witness is a foreigner, and the question asked referred to time previous to his residence in the United States.

Held, that as the question put to the witness did not relate to any matter of fact in issue, or to any matter contained in his direct testimony, and as a truthful answer to it would tend to degrade him, he was not bound to answer it.

In re HENRY LEWIS.

THIS cause is now pending before me. A witness is under examination on the part of the creditors of the bankrupt's estate, for the purpose of showing that the petitioner has either

destroyed, altered, mutilated, or falsified, or caused to be destroyed, altered, mutilated, or falsified, some of their books of accounts, book, document or writing relating thereunto, contrary to the provisions of Section 44 of the act.

The direct examination has been closed, and the witness is on his cross-examination. Counsel for petitioner asks the following questions:

EXTRACT FROM MINUTES.

Q. Have you at any time been employed by any person or firm in Manchester, England? A. I have, but not in the capacity of book-keeper.

Q. By whom? what was the nature of your employment? and how long did you remain in it?

(Objected to as irrelevant and immaterial—the witness can only be examined as to the times during which he was a book-keeper, he being called as an expert. Overruled—excepted.)

A. I cannot answer that question without making admissions which would be more or less humiliating to me.

Q. Question repeated. A. I decline to answer the question, and ask the Register's protection.

Counsel for bankrupt insists upon the question being answered, and asks that the Register direct the witness to answer the question.

The Register—I decide that as the question stands the witness must answer the question, unless he say, under oath, that he cannot truthfully answer it without stating facts or circumstances which would bring upon him some moral turpitude or the commission of some offense prohibited by law.

Witness—I say the answer to that question would tend to degrade me.

The Register decides that degradation is moral turpitude, and comes within the rule as laid down by the courts, and the witness is not obliged to answer the question, and will certify the question to the District Court.

Counsel for bankrupt requests the Register to certify the question to the court.

The witness declines answering the questions, and claims the personal privilege of declining to answer the questions on the ground that a truthful answer to said questions would tend to degrade him, etc., and applies to the court for protection. The court, as in duty bound, informed him of his legal rights, V. Chan. Ct. 1833, *Taylor* v. *Wood*, 2 Edw., 94. The witness again pleaded his privilege, and the court decided as above stated. It will be observed that the witness is a foreigner, and whatever offenses he may have committed in England, he cannot be punished for them here; but his admissions, or confessions of the commission of any crime or misdemeanor, or of any act which exposes him to any penalty or forfeiture in any country, or if by answering these questions the answer would tend to such a result, he is excused from answering the questions. Court of Appeals, 1847, *Henry* v. *Salem Bank*, 1 N. Y.; 1 Comst., 83, affirming S. C. 2 Den., 155; 24 Ward, 360.

The right of a witness to answer is a personal privilege; his right to exercise it rests in his own discretion; he uses it at his peril.* The courts of this State have for years held that a witness was not compelled to answer any question, the truthful answer to which would have a tendency to implicate the witness in a criminal charge, or expose him to a penalty. 24 Wend., 360. The court is to determine whether the answers he may give could directly or indirectly criminate him by furnishing evidence of his guilt by his own admissions; even if it only established one fact out of many, which, taken together, would be sufficient to warrant his conviction, his privilege should be allowed. If the court holds that the answer might in any way criminate the witness, the witness is not to be compelled to explain how he would be criminated by such answer. In matter of *Tappin*, 9 How. Prac., 394; Ct. of Errors, 1845, *Curtis* v. *Knox*, 2 Den., 341; Ct. of Appeals, 1848. And also where answers to a question would have disgraced the witness, the

* N. Y. Superior Court, Sp. T. 1834, *Hurdt* v. *Wetmore*, 2 Robt. 697; *Southard* v. *Redford*, 6 Cow., 255; 1845, *People* v. *Bodine*, 1 Den. 281; 2 Barb. 216, *People* v. *Anlantmon, alias Mdme. Restell.*

privilege may be pleaded, and must be allowed by the court.*

In 2 Barb. 216, *People* v. *Lohman*, alias *Mdme. Restell*, (Marie Bodine case) the court held that where a party intends to coerce an answer from a witness tending to degrade him, such party is bound to show affirmatively that the question is relevant. In the case of *The People* v. *Mather*, 4 Wend., 229, the court says: If the witness was obliged to show how the testimony would affect him, the protection would at once be annihilated. In this case, it will be observed, the witness is not asked any question in regard to which he has testified in his direct examination, or anything applicable to this case, and in no way relating to the correctness, accuracy, or the way or manner in which the petitioner's books of account were kept. The answers, if given, will not be in any way inconsistent with his testimony already given on this trial, and cannot implicate him in perjury. *Mitchell* v. *Hinman*, 8 Wend., 667; *People* v. *Bodine*, 1 Den., 181: and the authorities cited in these two cases respectively.

Courts should exercise great care in compelling witnesses to answer questions where the witness claims the privilege, as is claimed by this witness, and has brought himself within the rule, as it is a matter exclusively between the court and the witness. The opposite party cannot object. He has no right to insist upon the privilege and require the court to exclude it on that ground, as the witness has the right to waive his privilege, and, if ordered to testify, he may refuse and be committed.†

In the case of *Mordaunt* v. *Mordaunt*, in England, a suit for a divorce on the part of the husband, the Prince of Wales was examined as a witness on the part of the defendant.

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* 4 Wend., 250; Cow. & H. Notes, N. 521; 1 Burr's Tr., 244; 1 Greenl. S., 454. Ct. of Appeals, 1843, *Lohman* v. *People*, 1 N. Y., 1 Comst., 83, affirming S. C., 2 Barb., 216.

† 3 Hill, 564; *Thomas* v. *Newton*, 1 Mood & Malk, 48, N. *b.*; *Treat* v. *Browning*, 4 Conn. R., 408. *Southard* v. *Rexford*, 6 Cowen, 259; Cowen & Hill's Notes to Phil. Ed., 784, *b.*; *Forbes* v. *Willard*, 54 Barb., 520.

The court, Lord Penzance, in advance of any question being asked the Prince, of his own accord stated (witness did not plead his privilege), "That no witness was bound to make to any question an answer which would admit that he had been guilty of adultery."

It will be observed that the court did not confine the answer to any question as to adultery with the defendant, but held that "no witness was bound to answer any question that would admit he had been guilty of adultery."

This was in conformity to the provisions of an act of Parliament recently enacted, in relation to the privileges of witnesses.

Judges should exercise a sound discretion, and be governed, in a great measure, by the circumstances of the case. If it is apparent from the questions asked that the witness may have committed some indiscretion, or been guilty of some act of moral turpitude in times gone by, which act, if proven, cannot in any manner become relevant to the questions at issue, I hold it to be the duty of the court to shield a witness from proclaiming his own infamy, derelictions of duty, or of any act involving moral turpitude, tending to degrade or disgrace him in the esteem of his fellow-men. That whenever it is apparent that a witness shows signs of a reformation, or any desire to lead a correct or virtuous life, that the judiciary should take the first step to encourage such laudable endeavors on the part of any person, and especially should not, unless the law definitely requires it, allow its records to contain the evidence of its witnesses' moral degradation—particularly so in this country, where the waves of moral depravity and pollution are so rapidly ingulfing our young men. It may well be asked, if the judiciary cannot or will not stem the tide or breast these waves—who can or will?

The courts enforce the attendance of witnesses by compulsory process; disobedience to such mandate of the court is a crime punishable by the court, whose mandate has been disobeyed, by fine, imprisonment, or both.

The judgment of the court committing a party for contempt

becomes, by operation of law, a conviction. The President alone, by Article 2, Section 2, Subdivision 1 of the Constitution of the United States, can pardon or reprieve the person convicted of the contempt, when the proceedings were in the United States courts. *In re* Adams, 36 How. Prac. Rep., 57, and the cases there cited. And by the Revised Statutes of this State, whenever a party has been guilty of a contempt, and if actual injury has been sustained by such misconduct, a fine shall be imposed sufficient to indemnify the party injured thereby.

Witnesses do not volunteer their testimony. They are to testify to the truth. They are supposed to be disinterested persons, unless parties to the action. They are entitled to the protection of the court both in person and in character. It cannot further the ends of justice to destroy the character of a witness, especially when no question of veracity is raised. Neither should witnesses be placed in fear of having their character impugned or defamed, in cases where no question at issue before the court could warrant such a proceeding.

The witness is being examined as an expert. He has given testimony in his direct examination in relation to the books of the petitioner, the manner in which they were kept, of inaccuracies, erasures, interlineations, and defects therein, etc., as is above stated. The questions asked in his cross-examination, to which he pleads his privilege, do not in any manner affect his testimony in relation to the books. They speak for themselves. He has only testified to their present condition, as he finds them, and has given his opinion as an expert in bookkeeping, as an accountant, etc.; also his conclusions founded upon facts derived from such examinations.

After a careful examination of the rules of law applicable to this case of the national and State courts, and of various authorities both in this country and in Europe, I am of the opinion: 1st. That the greatest latitude should be allowed on a cross-examination, and such latitude rests in the sound discretion of the court; and that the witness must answer all questions pertinent to the issues being tried, unless such questions come

within the rule of privileged questions, of which the witness may avail himself. 2d. That these questions do come within said rule, that the witness has properly pleaded his privilege under oath, has brought himself within the rule, and should not be compelled to answer them, as he swears that the truthful answer thereunto would tend to degrade him, etc. 3d. That the answer to the questions, though they should tend to the utter ruin of the moral character of the witness, and showed the commission of offenses involving acts of the greatest moral turpitude, could not in any manner benefit the petitioner, as the testimony of the witness relates only to the present condition of the books of the Commissioner, and his opinion based upon their present condition, as by Section 44 of the Bankrupt Act, the court has to pass upon all the facts as they appear from said books. 4th. That the questions are privileged, and I hold that the witness need not answer the questions.

JOHN FITCH, *Register.*

BLATCHFORD, J.—As the question put to the witness did not relate to any matter of fact in issue, or to any matter contained in his direct testimony, and as a truthful answer to it would tend to degrade him, he was not bound to answer it.

UNITED STATES CIRCUIT COURT—S. D. NEW YORK.

Where the petitioner, a creditor of bankrupt, employs counsel, and incurs expenses by which all the creditors are benefited, asks that such expenses and counsel fees be defrayed out of the funds in the hands of assignee,

***Held*, that all reasonable expenses be allowed.**

In re THE NEW YORK MAIL STEAMSHIP COMPANY.

WOODRUFF, C. J.—The petition of the National Bank of the Commonwealth in this proceeding, being presented to the District Court of this district, and the District Judge, as a stockholder in the said bank, being concerned in interest, the pro-

ceeding has been certified to this court pursuant to Section 11 of the act of May 8, 1792. (1 Stat. 279.) This petitioner was the petitioning creditor upon whose application the above-named debtor was decreed bankrupt, in which proceeding the property of the debtor was protected for the benefit of creditors; an adjudication declaring the debtor bankrupt was had, an assignee appointed, and a large amount of property came to and is now in the hands of such assignee, subject to distribution to creditors. For the institution and conduct of those proceedings, the petitioning creditor was obliged to, and did employ counsel, and incurred the expense of such employment, and the amount of such expense is shown to have been reasonable. And such petitioning creditor now asks in substance, that in making distribution of the fund in the hands of the assignee, this expense incurred for the common benefit shall be charged on the fund. So that, practically, the creditors who come in to share the benefit of the decree in bankruptcy and the fruits thereof, may share also in the said expense of procuring them. The mere statement of the application shows the eminent justice and equity of the relief sought. No reason can possibly be suggested why these petitioning creditors should pay these expenses without chance of reimbursement, and thereby to this extent lose (for the greater advantage of other creditors) the benefit of the proceeding. Independently of any adjudications already had upon the subject, I should say that the principles governing courts of equity in dealing with a fund brought within its jurisdiction for the purpose of distribution, or in lending its advisory aid for the purpose of guiding or controlling its administration, sanction the allowance of this expense, and there, as well as in proceedings in bankruptcy, the ordinary fee-bill, providing for taxable costs, does not provide for it. I concur in the conclusion of several of the district judges who have passed upon this question, and the sanction of those decisions by Chief Justice Chase renders extended discussion unnecessary. *In re* Williams, 2 N. B. R., 453, 490; *in re* Waite & Crocker, 2 *Id.*, 452; *in re* Schwab, 2 *Id.*, 488; *ex parte* Platt, 2 Wall, 453; *in re* Mittel-

dorfer, 3 N. B. R., 1. Such allowances should be guarded by the most cautious regard for the rights and interests of the creditors at large, lest, under the form of necessary expenses, undue liberality to counsel should be sanctioned in reduction of the fund. And if there was any suggestion in this case that the charge was in any degree unreasonable, I should deem it proper by reference, or otherwise, to cause further inquiry to be made. Let an order be entered directing the allowance, to the petitioning creditors, of the expense of counsel, as prayed for.

UNITED STATES SUPREME COURT—TERRITORY OF UTAH.

Where a creditor holds a mortgage lien upon the real estate of bankrupt as security, etc., proceeds to foreclose,

Held, a creditor, whose debt is provable, cannot prosecute to final judgment either at law or in equity. Creditors holding security can be admitted as creditors only on the balance after sale thereof—he must go into court.

Equity of the Bankrupt Act—Synopsis of the acts of 1841 and 1867—Jurisdiction of the court—Powers of assignee—Additional powers by the act of 1867.

In re J. M. SNEDAKER

OPINION OF THE COURT.

HAWLEY, J.—The question before the court is a motion made on the part of Henry J. Faust, assignee in bankruptcy of the estate of the said J. M. Snedaker, based upon the opinion of the said assignee, setting forth, among other things, that F. D. Clift, one of the creditors of said bankrupt, held a mortgage lien upon certain real estate mentioned in said petition, belonging to the said estate, as security for the payment of a certain debt of the said bankrupt, in the sum of six thousand dollars, and that the said Clift, without regard to the said bankrupt proceedings, had commenced independent proceedings in the Third Judicial Court to foreclose his said mortgage, and that such proceedings were now pending and undetermined therein, and thereby prayed that an injunction might issue to restrain said proceedings, etc.

In examining this case, it must be borne in mind that the primary and chief design of the Bankrupt Act is to distribute the bankrupt's estate among his creditors, under the provisions of the act. Mortgage and other liens that have been obtained fairly and in good faith, are recognized and protected by the act when the mortgagee or lawful holder thereof conforms to its provisions for the purpose of establishing and realizing upon such security. But, to do this, the secured creditor, in availing himself of such special priority over other creditors, and especially after insolvency and bankruptcy, and notice thereof have taken place, and proceedings in bankruptcy have been commenced against the mortgagor, who has been duly adjudged a bankrupt, as in the case at bar, must take notice of such proceedings and have due respect to the same, as well as to the provisions of the Bankrupt Act under which they have been commenced, or otherwise confusions would be liable to arise between conflicting rights and interests, and thereby some of such rights might be placed in jeopardy. All the other creditors, who have recourse only upon the remaining estate, have equities in the mortgaged estate; and wherefore such equities should be carefully watched and protected, and, if possible, made available for the universal good of such other creditors.

In weighing the very able arguments of counsel on both sides of the question, and in applying the several authorities introduced by counsel, and in order to a just and proper appreciation of them, it becomes necessary to analyze the several Bankrupt Acts upon which they were severally made; or at least so far as the motion under consideration renders it necessary. In doing this, we will give a synoptical statement of the acts of 1841 and 1867, or rather of such sections of them respectively as bear upon the questions involved.

By the act of 1841, Sections 3, 5, 6, and 11, we find the following powers granted:

First. The jurisdiction of the court extended to all cases and controversies in bankruptcy between bankrupt and creditors, to all cases and controversies between creditors and assignee, to all cases and controversies between assignee and bankrupts, and to

all acts, matters, and things to be done under the bankruptcy until the final distribution and settlement of the estate, and the close of all the proceedings in bankruptcy. (See Section 6.)

Second. The assignee was invested with all the rights and powers of the bankrupt. (Section 3.)

Third. All suits in law or equity pending, in which the bankrupt was a party, could be prosecuted and defended by the assignee to a final conclusion. (Section 3.)

Fourth. All creditors proving their debts could not maintain any suit at law or in equity against the bankrupt. (Section 5.)

Fifth. The assignee has full power and authority, under the directions of the court, to redeem mortgage or other pledged property, real and personal, and to discharge such liens therefrom. (Section 11.)

By the act of 1867, we have the following provisions:

JURISDICTION OF COURT.

The jurisdiction of the Bankrupt Court shall extend to all cases and controversies arising between the bankrupt and creditors *who shall claim any demand under the bankruptcy*, to all collections of the assets of the bankrupt, *to the ascertainment and liquidation of liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties;* to the marshalling and disposition *of the different funds* and assets, so *as to secure the rights of all parties*, and the due distribution of the assets among all the creditors. (Section 1.)

POWERS OF ASSIGNEE.

The assignment shall relate back to the commencement of proceedings in bankruptcy, and by operation in law the title of all real and personal estate shall rest in the assignee, though attached by *mesne process* within four months; all rights of redeeming of the estate, all rights in equity, choses in action, patents and patent rights, and copyrights, all debts due him or to others for his use, and all liens and securities therefor; he may sue for and recover the estate, debts, and effects, and

may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy. (Section 14.)

No person shall be entitled to maintain an action against an assignee, for anything done by him, without twenty days' notice, etc.

The assignee shall have authority, under the direction of the court, to redeem or discharge any mortgage, or conditional contract, or pledge, or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the consideration thereof, *or to sell the same*, subject to such mortgage lien, or other incumbrances.

The assignee shall demand and receive from all persons holding the same, all the estate assigned or intended to be assigned under this act, etc. (Section 15.)

If an action is pending in behalf of the debtor, the assignee shall be admitted to prosecute the action in his own name. (Section 16.)

First. When a creditor has a mortgage or pledge of real or personal property, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be first admitted as a creditor only on the balance after deducting the value of the property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court may direct; or,

Second. The creditor may release or convey his claim to the assignee, upon such property, and be admitted to prove his whole debt; or,

Third. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or,

Fourth. The assignee may sell the property, subject to the claim of the creditor thereon.

Whichever course of policy may be adopted, the assignee or creditor respectively shall execute all deeds and writings necessary to consummate the transaction.

If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt. (Section 20.)

Creditors proving their claims are not allowed to maintain any suit at law or in equity against the bankrupt. (Section 21.)

No creditor, whose debt is provable under the act, shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the debtor's discharge shall have been determined.

If, however, the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment to ascertain the amount due, which amount may be proved in bankruptcy, but execution shall be stayed.

By a careful examination of the above abstract of the said provisions of these two Bankrupt Acts, it will be observed, that the act of 1867 contains upon the questions involved in the motion under consideration many provisions not in the act of 1841.

In addition to the jurisdiction conferred upon the Federal Courts by the act of 1841, we find the act of 1867 to contain authority for the ascertainment and liquidation of liens, and other specific claims for the adjustment of the various priorities and conflicting interests of all parties concerned, and for the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties, and due distribution of the assets among all the creditors, under the acts.

In addition to the act of 1841, the assignee can sell mortgaged property subject to liens, or by agreement with the holder of the security fix the value of the incumbered property over that of the debt for which it is held as security, or release to the creditor the bankrupt's right of redemption on receiving from him the excess of the value of the mortgaged property over that of the debt, and may with the bankrupt execute deeds to such mortgaged property when so disposed of.

The assignee, as a further power, may also receive or demand from all persons holding the same, all the State assigned or intended to be assigned under the act.

And, as a further power, it prohibits all creditors, whose debts are *provable* under the act, from prosecuting to final judgment any suit at law, or in equity therefor, against the bankrupt, until the debtors' discharge shall have been determined.

And, as a further power, it provides, that if such mortgaged property is not so sold, or released, or delivered up to the assignee, the creditor holding the same shall not be allowed to prove any part of his debt.

In addition to these further powers under the act of 1867 to the prescribed oath of a secured creditor, set forth in Form No. 21, which must be considered and taken to be, so far as it has application, a part of the act itself, this prescribes, after setting forth and describing the secured creditor's claim, that the bankrupt is justly and truly indebted to him in the sum of ——— dollars, for which said sum, or any part thereof, he has not, nor has any person by his consent, order, or to his knowledge or belief, for his use, received any security or satisfaction whatsoever, save and except the mortgage hereinafter mentioned; that the claim was not procured for the purpose of influencing the proceedings under the Act of Congress entitled, "An Act to establish an uniform system of bankruptcy throughout the United States," approved March 2, 1867.

That no bargain or agreement expressed or implied has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of said claim, or any part thereof, against said bankrupt, or to take or receive, directly or indirectly, any money, property, or consideration whatsoever, whereby the vote of such creditor for assignee, or any other action on the part of such creditor, or any other person, in the proceedings under said acts, has been, is, or shall be in any way affected, influenced, or controlled; and then further prescribes that such creditor shall add to such proof of his claim, a particular description of the debt, and also of the property held by him as security, and the estimated value of such security or property.

These additional powers, contained in the act of 1867, are

very great, and seem to justify the conclusions that all the property and equities of the bankrupt, whether mortgaged, pledged, or otherwise encumbered, and in whosesoever hands the same may be, shall be delivered up to the assignee, subject to all *bona fide* liens, to be by him disposed of for the benefit of the creditors; and further, that the avails thereof be distributed by him to the creditors under the act; and that in the sale of mortgaged or other pledged property, he shall have due respect to such liens thereon. It is but just, as well as a compliance with the spirit, if not with the letter of the act, that all the property, rights, and equities of the bankrupt should not only pass to, but be actually taken and disposed of, or converted into money by the assignee, and then distributed by him under the act, according to the rights of the several creditors, having respect to priorities. It is but just, as well as a compliance with the spirit, if not with the letter of the act, that the secured creditors, as well as the others, should be required under the solemnities of a proper oath or oaths, to prove before the Register their several claims, and the value of the property held by them for the security of their claims; or otherwise, a wide door would be left open for the perpetration of fraud against all other creditors.

By the act of 1841, no creditor or other person coming in and proving his debt or other claims shall be allowed to maintain any suit at law or in equity therefor; but by the act of 1867, in addition to the above provisions, it is further provided, "no creditor whose debt is provable under the act, shall be allowed to prosecute to final judgment any suit at law or in equity therefor, against the bankrupt, until the debtor's discharge shall have been determined" (see Section 21), and by the 20th Section "a creditor having a mortgage or pledge of real or personal property, or a lien thereon for securing the payment of a debt owing to them from the bankrupt, he shall be admitted as a creditor only on the balance, after deducting the value of the property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court may direct," etc.

By the terms of the act of 1867, it is manifest that a secured creditor, by proving his claim against the bankrupt before the Register, who in and by a proper oath sets forth and particularly describes his mortgage, lien, or other security, and the property so pledged and its value, and thereby claims to be entitled to share in the balance of the assets for only the balance of his claim, after realizing what he may out of his said securities, must and will be fully protected by the Bankrupt Court in his rights in the premises according to such proof. Such proof, so far from destroying or making void his mortgage, lien, or security, establishes the same, and also secures to himself with it, his right under the act to share in all other of the assets of the bankrupt with other creditors, for whatsoever balance of his said claim as remains unpaid after giving full and exact credit for the amount he may have realized upon the sale of the property so pledged to him in good faith.

For just and equitable purposes, and to guard against fraud, the act rightfully takes the pledged property or lien out of the power of the secured creditor's control or management, in reducing it to money in his chosen way, without responsibility, and places it in the hands of the assignee of the bankrupt, who, being an agent of the court, and at the same time the representative of the rights of all parties in interest, is supposed to be above all temptation to fraud; and directs him in such capacity, and under the pledge of his official bond as assignee, and under the directions of the court, to convert such mortgaged or pledged property into money, and to distribute the same under the provisions of the act, with due regard to all the priorities shown to exist in the proceedings of bankruptcy by the proof of the claims against the bankrupt; so far from taking any right or rights from the secured creditors under the mortgaged lien or pledge by which he holds the same, it simply regulates the modes and means of foreclosing the mortgage or other lien, and of reducing such security to money, in order that the court may be able to enforce exact justice, and so that the rights of all the creditors are secured to them under the proof of claims and under the law.

If, by some of the provisions of the act, there is a seeming right of the secured creditor to stay out of the Bankrupt Court with his claim and pledged property of the bankrupt to secure the same; and also a seeming right to be left alone with both claim and security, with the right, by himself, or under the powers and jurisdiction of some other court, to foreclose and sell the same, and liquidate his own debt, and to return the balance, if any, to the bankrupt, or to the assignee of the bankrupt, yet it must be conceded that there are other provisions, which we have above set forth, which properly or even strictly construed prohibits such creditor from so doing, and compels him to come into the Bankrupt Court for his rights under the act. It is a general rule that the several provisions of the act must be so construed as to gain effect and harmony to the same in its true spirit and manifest intention of the same, its primary and chief design being, as we have before said, to distribute the bankrupt's estate among his creditors, according to justice and equity, having due regard to all priorities, mortgages, and liens under the act; and for that purpose and to that end, the court being granted equitable jurisdiction and clothed with all powers at law or in equity over all matters pertaining to the bankrupt's estate, with the especial view to carry out such designs, the conclusion that all the property, choses in action, and effects, and interest, and equities of the bankrupt must be brought into the Bankrupt Court for settlement, disposition, and distribution under the act, is inevitable. (Sections 1, 14, 15, 16, 20, 21.)

The authorities cited by counsel in behalf of the said secured creditor were rendered under the act of 1841, and while they are sound and controlling under that act, and the state of facts they set forth, they are not in point nor of weight under the provisions of the act of 1867, on the points arising in this case.

In re Davis' Assignee v. *Bittel et al.*, 2 N. B. R., 395, decided by his Honor, Judge Treat, of Missouri, is not strictly in point. Yet it approaches so near in principle, that it sheds much light upon the questions involved in the motion under consideration. While we are not now called upon to decide

the question which he decided in that case, still we must say that much of his argument commends itself to our judgment, but we are not quite prepared to say with him, as he said in that case, that a sale under such circumstances, made by a trustee or mortgagee, is absolutely void. Nor are we prepared to say that he is not right, but we have no hesitation in saying that such a sale, in our judgment, would be voidable.

From the premises and conclusions above expressed, it is manifest that this court has jurisdiction over the property mentioned in the bankrupt's petition, and has power to restrain the said secured creditor and other persons from prosecuting in the said District Court the said proceedings, to foreclose said mortgage lien upon the said property; and we are also of the opinion that, under the circumstances, facts, provisions, and powers of the Bankrupt Act, this court, having jurisdiction, is bound to exercise the same, and that, therefore, an order should be made in this case in conformity to the prayer of the said petitioner.

C. U. HAWLEY,
Associate Justice of the Supreme Court.

I fully concur in the above opinion.

O. F. STRICKLAND,
Associate Justice.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

A transferred property to B, with a view to giving a preference. C purchased a portion of said property from B. The marshal seized the property and effects of A, including that purchased by C, under warrant, whereupon C prays the court to order a return of same.

Held, 1. That the marshal, under a warrant issued in accordance with Section 40 of the Bankrupt Law, may take possession of the property of the debtor wheresoever and in whose hands soever he may find it.

2. That if indemnified, it is made his duty in the one case to *retain* possession, and to *take* possession in the other. With indemnity, he would be liable if he did not exercise his authority—without it, it is optional with him.

In re DEXTER M. BRIGGS.

LONGYEAR, J.—February 10, 1870, a petition was filed by a

creditor of Briggs, praying that he be declared a bankrupt. The act of bankruptcy charged is transfer of property by Briggs to one Kenyon, with a view to give a preference to said Kenyon, and otherwise in violation of Section 35 of the Bankrupt Act. On filing the petition, a warrant was issued under Section 40, for seizing the property and effects of the debtor. Under the warrant the marshal took possession of all the property claimed to have been so transferred by Briggs to Kenyon, all of which he found in Kenyon's possession, except one cow and one calf, which he found in possession of one Goodrich. Goodrich now comes and presents his petition, claiming to have purchased the said cow and calf from Kenyon, and praying the court to order a return of the same to him.

The ground of the application is that the marshal had no authority to take property out of the possession of any person claiming to be a purchaser of the same. The warrant issued under Section 40 commands the marshal, among other things, "forthwith to take possession provisionally of all the property and effects of the debtor." This seems sufficiently broad to authorize the marshal to take possession of the property, etc., of the debtor, wheresoever, or in whose hands soever, the same may be found.

But what is the marshal's authority under the warrant in a case like the present, in which the property was in the possession of another person, claiming to own the same, but which the petitioning creditor claims belongs to the debtor? Rule 13 of the General Orders in Bankruptcy, as amended by the Supreme Court at the December term, 1867, provides that, "It shall be the duty of the marshal or messenger to take possession of the property of the bankrupt." * * * "Provided, however, that if any goods or effects so taken into possession as the property of the bankrupt, shall be claimed by or in behalf of any other person, the marshal shall forthwith notify the petitioning creditor of such claim, and may, within five days after so giving notice of such claim, deliver them to the claimant or his agent, unless the petitioning creditor * * * shall by bond * * * indemnify the marshal," etc. "And provided further,

that, in case the petitioning creditor claims that any property not in possession of the bankrupt belongs to him, and should be taken by the marshal, the marshal shall not be bound to take possession of the same, unless indemnified in like manner."

These provisions are intended for the protection of the marshal, but at the same time they contain a clear recognition of the authority of the marshal under the warrant to hold possession of property claimed by other persons when once in his possession, and to take possession of property not in the possession of the bankrupt, whether indemnified or not. If indemnified, it is made his duty to retain possession in the one case, and to take possession in the other, and he would be liable if he did not. If not indemnified, he is merely released from liability if he does not do it. His authority is derived from the warrant, and is as complete in the one case as in the other. With indemnity, he is bound to exercise his authority; without it, he may exercise it or not, at his option. See *In re* Muller & Brentano, 3 N. B. R.

I am therefore of the opinion that the marshal had authority to take possession of the cow and calf in the hands of Goodrich, and the prayer of the petitioner must be denied.

The merits of the question as to the validity of Goodrich's claim to the property are, of course, not affected by this decision.

UNITED STATES DISTRICT COURT—RHODE ISLAND.

Where a discharge is refused bankrupt on the ground of his having given a preference,

Held, the bankrupt is a trustee for his creditors. Property must be administered in accordance with the provisions of the National Bankrupt Law.

Q.—Can one of the leading purposes of the Bankrupt Act be thwarted by and through the means of a continuing indemnity mortgage, unlimited in amount?

In re Louis J. Doyle.

The court adjudged six of the specifications not sustained, but finding one of the four allegations embraced in a seventh specification to be established, refused a discharge.

This specification contained allegations or charges of fraudulent preferences made by the petitioner—1st, to Hunt, Tillinghast & Co.; 2d, to Gideon L. Spencer; 3d, to Doyle & Joslin; and 4th, to William Barstow. The first of these was summarily disposed of, as unsupported by the proof; but in regard to the other three, the court, after recapitulating the facts and circumstances in proof, which bore upon them especially, proceeded to express its views.

The charge of a preference to Spencer was dismissed as unsupported; but that of a preference to Doyle & Joslin (a payment of two thousand dollars on the 10th of December, 1868, two days prior to the petitioner's failure) was adjudged sustained, rendering it unnecessary to express an opinion upon the fourth charge of a preference to William Barstow, on or about October 1st, 1868.

The law of the case (as counsel had been apprised prior to the hearing), the court premised, was to be found in a ruling of Judge Fox, of Maine, *In re* Gay, 2 N. B. R., 358, adopted and commended by Judge Blatchford, of New York, in *Lewis* v. *Rosenham*, *Ib.*, 449. Says Judge Fox, "I hold that in order to deprive a party of his discharge, the transfer or conveyance constituting the preference must be made by him in contemplation of bankruptcy or insolvency, or when he is in fact insolvent; and in the latter case, the court must not only be satisfied that he was insolvent, but further, that he had actual knowledge of his insolvency, or had good grounds for fearing and believing that he was insolvent, and acted on such belief in making the preference. In short, he must have designedly and intentionally given a preference, meaning to secure or pay that particular creditor, when he was not able to pay all his debts in the usual and ordinary course of business at the time, fearing and believing such to be the condition of his affairs. If such is his situation, and he so acts, meaning to secure a favored creditor, whether his other creditors shall get their pay or not, I am of opinion that he is not entitled to his discharge. He has a fraudulent purpose and design to violate the law by giving one of his creditors security, when he believes he cannot

do the same by all others, or discharge his liabilities to them as they accrue."

Treating of the preference to Doyle & Joslin, the court said:

Was the petitioner insolvent December 10th, 1868? Did he know, or have reasonable cause to know, that he was insolvent? Did he mean to secure or pay Doyle & Joslin, being not able to pay all his debts in the usual and ordinary course of business at the time, fearing and believing that to be the condition of his affairs?

To each of these three interrogatories, I am constrained by the law and the evidence to give an affirmative answer.

That the petitioner had been insolvent, in every sense of that word, for many months, cannot be questioned. That he knew it is a fair inference from his answers to the questions put to him as to this point. When asked as to his knowledge of his condition, at various dates from March, 1867, to December 12, 1868, declining to say he did believe himself able to pay his debts, he invariably replies evasively that he could not say as to this, until his property (real estate, beaver cloths, and cassimeres, included) should be sold. But whether he *knew* and believed that he was insolvent, is not the question. It suffices that he had reasonable cause to know and believe that his condition was that of insolvency; and as to this the testimony is plenary and convincing. His books showed his insolvency, and besides this the petitioner says, truthfully I doubt not, that he always knew the state of his affairs, irrespective of his counting-house records.

Throughout the summer and autumn of 1868—to name no earlier date—it is manifest that his was the condition of the "strong man struggling in a bog," keeping his head above water, to use his own expressive phrase, only through the forbearance and favor of Hunt, Tillinghast & Co., William Barstow, and, I will add, Doyle & Joslin; his business (in his own language again) going down hill with a daily increasing momentum and velocity; his property, parcel after parcel, being mortgaged, directly or indirectly, to Barstow, and his commercial paper being met only by renewals, in whole or in part,

Hunt, Tillinghast & Co., and Barstow accepting and indorsing—the paper on which they were liable being invariably cared for and protected—while the claims of other creditors, in November, if not earlier, were put off—not met in the usual course of business. Whether the Barstow and Hunt & Tillinghast paper can be said to have been met in the usual course of business (having been paid only by renewals or new loans), is a question upon which I need not here express an opinion.

As to the intent of the petitioner in paying to Doyle & Joslin the two thousand dollars, there is, it is true, some ground for difference of opinion. It is said that the plaintiff did not contemplate stopping payment and business—but until about noon of the 12th of December, 1868, confidently expected to go on, as he had been going on, hoping for better times; and therefore, it is argued, he could not have intended to prefer Doyle & Joslin. It is enough to say, in reply to this, that the evidence fails to satisfy me that the probability of a failure and a breaking up of the business within a brief period, had not been the subject of thought and meditation for days, if not weeks and months, before the 10th of December, on the part of the petitioner, with or without the privity of Barstow. Indeed, the petitioner says that Mr. Barstow had consented, in order that he might go on with his business, to indorse new paper to the amount of twelve thousand dollars, *if Hunt, Tillinghast & Co. would discount that piece of paper.* Nay, more, that he took with him to New York on the 12th, a note thus indorsed, which Hunt, Tillinghast & Co. declined to discount, without giving any reason, except that they did not feel inclined to do it; whereupon the petitioner then and there at once, without conference with or notice to Barstow, determined to allow his paper, due that day, to go to protest, although he had the means to meet it, and virtually then and there failed, in effect acknowledging himself bankrupt as well as insolvent. Evidently, between Doyle and Barstow, there must have passed conversation, in which the probability of a breaking up of the petitioner's business must have been alluded to, if not fully considered and discussed.

Indeed, in view of the evidence and the lack of evidence, bearing upon this point, there is some reason for suspecting that this mode of bringing the Doyle business to a close, seemingly without premeditation on his part, was pre-arranged by and between two at least (if not all three) of the parties concerned. What would be the testimony of Hunt and Tillinghast and Barstow in this regard, we are left to surmise, as no questions bearing upon this point were addressed to them.

The payment to Doyle & Joslin did in fact operate as a preference, for it does not appear that the petitioner made any payment to any other creditor after the 10th of December; and in view of the circumstances in proof, and of the law applicable to them, I cannot but adjudge the payment under consideration to have been fraudulent, within the provisions of the Bankrupt Act.

It is but justice to the party most interested here to say that it is only when tested by the provisions of the Bankrupt Act, that the payment in question, or indeed any act of his brought to the notice of the court, is to be stigmatized as fraudulent, by a Rhode Island jurist, or by any of our Rhode Island moralists. He has, it appears in proof, for a long time prosecuted the hazardous business of cotton and wool manufacturing, under and in conformity with Rhode Island laws and customs, as hundreds have done before him—the few, very few, securing in the end, great wealth, and elevated social or political position—the many, without success. Under our State laws, it has always been legal, and (for aught that our ethical instructors in the pulpit or the professor's chair have taught us) honest also, to obtain possession on credit of large portions of this world's goods, to use them and peril them in the prosecution of an uncertain business; for year after year, though hopelessly insolvent, to keep creditors at bay by threats of assigning with preferences—and finally, after experimenting at the risk and expense of others for months or years, and perchance wasting in ostentatious or riotous living tens or hundreds of thousands of dollars, to make an assignment, preferring first the indorsers, upon whose credit the debtor had, in fact, lived, and moved, and

had his being. To provide a remedy for, and a preventive of the multiform evils inseparable from a system like this, was, really, one of the most important of the aims of the leading legislators of 1855, 6, and 7, in framing the Bankrupt Act. And not hastily and inconsiderately, but deliberately, was that act adopted. Whether a wise enactment, or other than wise, it is the law of the land. Of its probable enactment the public had years of notice, and if individuals or communities failed to set their houses in order, they are entitled to little sympathy if now, in 1870, these prove untenantable. It is shown by the dates of the mortgages above referred to that the petitioner and Hunt, Tillinghast & Co., and Barstow were not oblivious of the Bankrupt Act in the spring of 1867, but whether the petitioner and Mr. Barstow, in the summer and autumn of 1868, were as well advised as to its provisions as they should have been, may well be questioned.

That act, it is to be kept in mind, adopts as its cardinal principle the very opposite of the Rhode Island theory of property, as embodied in her laws, her judicial decisions, and the business habits of her citizens. The principle is well stated in an opinion, *In re Langley* v. *Perry*, 1 N. B. R., 559, in these words: "The intention of the law clearly was, that when a failing debtor was conscious of his inability to prosecute his business and pay his debts, he should at once subject his property to such a disposition as the Bankrupt Law has provided for. The property then becomes a sacred trust for the benefit of his creditors, who have a right to insist that it shall be administered, not according to the wish or preference of the insolvent, or in accordance with the insolvent law of the State, but according to the provisions of the national Bankrupt Law."

Thus stood the law in March, 1867, and thus has it stood from that time forward, entitled to obedience on the part of the petitioner as on the part of all other good citizens. He is to be presumed to have known, after March, 1867, that an individual actually insolvent could not legally retain his possessions, real or personal, and go on for months, not to say years,

consuming and jeopardizing the property of his creditors, in the hope either of acquiring wealth for himself, or of obtaining the means of discharging existing obligations. The Bankrupt Law constitutes such a debtor a trustee for his creditors. The property in his hands is theirs, not his; and as they shall prescribe, either through commissioners or by an assignee of their appointment, that property should be administered for the benefit of its owners. Nor has this law any clause of exceptions in favor of any class of minds or any class of traders. The capable and the incapable, the sanguine and the distrustful, the reckless and the discreet, the industrious and the lazy, are all subject to the same rule. None can claim exemption. Nature or circumstances may have made the individual a Micawber, always hoping and expecting something will turn up for his advantage, or he may be pre-eminent among the crowd of mortals who instinctively and habitually "listen with credulity to the whispers of Fancy, and pursue with eagerness the phantoms of Hope;" still must he yield obedience to the Bankrupt Law, or suffer the consequences. One of these consequences is, that when he shall ask to be discharged from his debts under the beneficent provisions of the law, that discharge shall be refused, if creditors opposing shall show that he has made any fraudulent preference. This the creditors have done in this case, and therefore a discharge of the petitioner is denied.

As to the allegation of a fraudulent preference to William Barstow, I refrain from remark in this connection. My finding, as already announced, renders unnecessary here any expression of opinion upon the several very interesting questions which the court must decide in passing upon that allegation. Those questions, I will add, may be expected again to present themselves in this case on appeal, or in some other case in this district, when, it is reasonable to hope, they will be settled by an authoritative decision. One of those questions, it will be remembered, was, in effect, Can one of the leading purposes of the Bankrupt Act be thwarted by and through the means of a continuing indemnity mortgage, unlimited in amount? a

question manifestly of no ordinary interest to many a capitalist of Rhode Island, and to their legal advisers as well.

SUPREME JUDICIAL COURT—SUFFOLK, MASSACHUSETTS.

The provision in the United States Bankrupt Act, U. S. St. of 1867, C. 176, Section 14, that an assignment under the act shall vest in the assignee the title to all the bankrupt's property, "although the same is then attached on mesne process," and "shall dissolve any such attachment made within four months next preceding the commencement of said proceedings" in bankruptcy, does not prevent the enforcement of a judgment against the bankrupt on a portion of his property attached in the action more than four months before he commenced proceedings in bankruptcy.

In re CARLTON BATES *v.* JOHN TAPPAN.

CONTRACT on a promissory note. Writ dated March 12, 1867. By the officer's return, it appeared that on March 14, he attached all the defendant's real estate in the county of Essex. The defendant, after filing an answer to the merits, commenced proceeding in bankruptcy on August 26, under the U. S. St. of 1867, C. 176. On December 11, he obtained his discharge in the District Court of the United States for the District of Massachusetts; afterwards pleaded the same in bar of the action; waived trial by jury and his first answer; and submitted the case, on his plea of discharge in bankruptcy, and the agreed fact that on March 14 he was seized of real estate in Essex, for the determination of the Superior Court, which ordered judgment for the plaintiff, "said judgment only to be enforced against the property attached on the writ, but not to be enforced against the person of the defendant or any other property;" and the defendant appealed.

G. W. Estabrook, for the plaintiff.

H. N. Merrill, for the defendant.

First. The general intent of the Bankrupt Act is, that all the assets of the bankrupt upon the day of the adjudication of bankruptcy shall be taken into the custody of the law, and made to discharge all the debts and claims provable under the

law. The debt in suit in this case was provable. U. S. St. of 1867, Chapter 176, Section 19. "No creditor whose debt is provable under this act, shall be allowed to prosecute to final judgment any suit at law or in equity therefor." Section 21. A discharge granted shall release the bankrupt from all demands provable; and may be pleaded "as a full and complete bar" to all suits brought on such demands. Section 34. But such discharge does not operate as a "full and complete bar," if judgment be rendered and execution issue after such plea, even if the judgment be limited in its force to property attached.

Second. The clause in Section 14, which provides that the assignment in bankruptcy shall dissolve attachments of the debtor's property made within four months next preceding the commencement of proceedings in bankruptcy, if held to imply strictly that all attachments not made within four months shall not be dissolved, would be repugnant to the provisions of Sections 21 and 34, as well as to the general intent of the statute. All conflict is avoided if it be held that the clause in Section 14 implies only a saving of attachments made in suits commenced four months before the bankruptcy, founded on any cause of action not provable as a demand against the estate of the bankrupt. Or all inconsistency in the act could be avoided by making this implied exception to the dissolution of attachments apply to cases in which an attachment had been in force more than four months, in a suit in which judgment was had before the bankruptcy of the defendant; that is, to protect attachments of long standing, during the interval between judgment and levy of execution. In such cases, no judgment would be rendered contrary to the express provisions of the statute. Congress could not have intended to preserve all attachments made more than four months before bankruptcy, by a mere negative inference, especially when in the same section it makes an express reservation of mortgages only; for, having expressed itself positively upon the same subject, it may be presumed that it so expressed all that was intended. *Davenport* v. *Tilton*, 10 Met., 320, was decided on a provision in the Act of 1841, in favor of

all liens already attaching to the property of the bankrupt. No such provision is to be found in the Act of 1867. Mortgages alone are excepted.

WELLS, J.—The provision in the Bankrupt Act, Section 14, that an assignment shall be made, and thereupon by operation of law, the title to all property, real and personal, "shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor," would imply that all such attachments are to be thereby vacated. It is a reasonable, not the necessary, inference. But it is not left to inference. The same sentence continues: "and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings." Such explicit terms do not admit of enlargement, nor of the special modifications which the defendant seeks to engraft upon the text of the statute. The provisions for a full discharge, Section 34, and forbidding the prosecution of any suit to final judgment against the debtor, Section 21, must be constructed, as they well may be, so as not to prevent the enforcement of a lien which the statute itself permits, by any requisite proceedings therefor which do not involve a judgment *in personam*. A lien by attachment can be enforced in no other way than by the qualified judgment which was rendered in the Superior Court. The entry must be, therefore, Judgment affirmed.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where the claim of a creditor, at first meeting, is postponed by the Register, and again presented after the election of assignee,
***Held*, that the proof of claim must be treated in all respects as if it had not been before tendered.**

In re ADOLPH B. HERRMANN, AND HERMAN HERRMAN.

I, THE undersigned, one of the Registers of this honorable court, do respectfully certify and report that, at the first meeting of creditors, I postponed the claims of Isidor Rosenthal

and others until the assignee should be elected. After the election of assignee, the said Rosenthal, by his counsel, Mr. Mackie, again presents his proofs. The question is, what is then the proper practice? Mr. Seixas, who objected to the proving of the claims before the election of the assignee, suggests that the proofs must now be received by the Register as if now for the first time offered, and thereupon, in the usual course, handed over to the assignee to share the same future as all other proofs, unless the assignee or some creditors should petition the court to strike out such proof, or reject the claims. If such application be so made, the court will refer it to the Register to take proof, and on the coming on of the proof will decide upon the validity of the claims. But if no such action is taken on the part of the assignee or creditor, the party will be entitled to share in the dividend.

Mr. Mackie, on the other hand, suggests the apprehension that the claim having been so far the subject of adjudication, that it is postponed under a quasi direction to the assignee to investigate the same, may require affirmative action on his part, to place the claim upon the footing of claims not so objected to and postponed.

It would seem that under Section 22, the burden of proof in opposition to a claim, proved in the usual form, is with the party, assignee or creditor, objecting to it. Yet, when a claim is postponed from the expressed opinion of the Register that it ought to be investigated by the assignee, I am not sure that this does not change the burden of proof, and make it the duty of the creditor whose claim is so postponed to take proof before the Register, on notice to the assignee and objecting creditors, making a *prima facie* case at least, of the justness of his claim; thus holding the affirmative in case the assignee desires to proceed and give evidence in opposition to it. If, upon the testimony so taken, there be an opposing interest, the Register must certify to the court for decision. If not, he may deem the proof satisfactory, if indeed it be satisfactory, and order distribution accordingly.

I. T. Williams, *Register.*

In re Bogert and Oakley.

BLATCHFORD, J.—The proof of claim, when now tendered, is to be treated in all respects as if it had not been tendered before the election of assignee and postponed.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

At the meeting of creditors, several members of one family offer proofs of claims for a large amount against the bankrupts, which were objected to by counsel for opposing creditors, and a postponement for investigation by the assignee, took place. One of the first named creditors, who is a son of one of the bankrupts, having a claim of fifty-six thousand nine hundred and thirty-nine dollars and eight cents against the estate, is elected assignee, which counsel aforesaid object to.

Held, the son of a bankrupt is not the proper person to be invested with the power of assignee and investigate the claims of other members of same family. Appointment not affirmed.

In re JOHN B. BOGERT AND CORNELIUS OAKLEY, JR.

THE undersigned, one of the Registers in Bankruptcy, hereby certifies to this honorable court, that, at the first meeting of creditors, objections were made to the following proofs by Mr. Ira O. Miller, of counsel for J. & D. J. Stewart, two of the creditors, to wit:

Kate B. Bogert	$7,456 88
E. A. Bogert	4,979 51
John V. Bogert	56,939 08
Elizabeth C. Bogert	595 92
Tyrril Bogert	516 81
John F. Lowell	19,834 42

Thinking that said claims ought to be investigated by the assignee, I postponed the proof of them until the assignee should be chosen, whereupon said John V. Bogert was elected assignee by the votes, as per statement annexed. Mr. Miller objected to the confirmation of said Bogert as such assignee, on the ground:

First. That he was a non-resident of the district.

Second. That he is the son of one of the bankrupts, hav-

ing claim against the estate of said bankrupt above referred to.

Upon said objections, I proceeded, on motion of Mr. Miller, Hon. Charles A. Peabody objecting, and took the testimony of said John V. Bogert, which is hereto annexed.

Pursuant to the requirements of Rule 19 of this honorable court, I beg to submit that, during the said meeting, which lasted two days, I saw nothing that tended to throw any suspicion upon the validity and good faith of the claim of the said John V. Bogert, nor do I see any reason why his election should not be confirmed, save the fact that he is a young man about thirty-two years of age, a son of one of the bankrupts, having a claim amounting to fifty-six thousand nine hundred and thirty-nine dollars and eight cents against the estate; and the further fact that members of the family of said bankrupt above-named present claims against said estate in the aggregate amounting to thirteen thousand five hundred and forty-eight dollars and sixty-two cents; and the further fact that John F. Lowell, who is a young man, the friend and lately a clerk of the bankrupt, and now a clerk in a hardware store at a salary of twelve dollars a week, presents a claim for nineteen thousand eight hundred and thirty-four dollars and forty-two cents against said estate, if indeed these facts be at all reasons why his election should not be affirmed.

I think it, however, my duty to call the attention of the court to 2 N. B. R., 45. All of which is respectfully submitted.

MEMORANDUM.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the New York *Times* and *Commercial Advertiser*, and by special notice served personally, or through the mail, we, whose names are hereunder written, being the greater part in number and in value of the creditors of the said John B. Bogert and Cornelius Oakley, Jr., bankrupts aforesaid, present at this meeting, and who have proved our debts, have chosen, and do hereby nominate and choose John V. Bogert to

be the assignee of the said bankrupt's estate and effects, and we do desire that he may be appointed such assignee accordingly:

John W. Stevens, Esq., New York City	$750 00
Meriden Butt Co., Meriden, Conn	141 28
Blackwell & Burr, New York City	433 50
Charles Van Bokkelin, New York City	400 00
Nathan Weed, New York City	55 65
C. C. Abel, New York City	1,286 61
Frederick H. Polt, New York City	48 00
Cutter, Tower & Co., New York City	42 85
Clark, Wilson & Co., New York City	169 63
De Witt Broth. & Co., New York City	28 59
Aaron L. Reid, New York City	300 00
Wm. A. Dodge & Co., New York City	356 35
Greenfield, Tool & Co., Greenfield, Mass	137 12
W. & S. Butcher, Sheffield, England	82 80
R. E. Hadley, Deposit, N. Y	66 56
C. Lockwood & Co., New York City	204 19
Bless & Drake, Newark, N. J	122 80
Augustus W. Payne, New York City	2,284 06
Newcomb Bros. & Sons, New York City	34 85
Sampson & Baldwin, New York City	328 76
J. S. Leverett & Co., New York City	28 75
John Post, New York City	121 98

John V. Bogert called and duly sworn. Mr. Peabody objected to the introduction of his testimony. Objection overruled.

By Mr. Miller:

1. Q. Are you the son of the bankrupt? A. I am.

2. Q. Do you keep house or board? A. I have boarded.

3. Q. Where? A. 140 W. 34th street.

4. Q. When? A. To-day.

5. Q. When did you take it? A. I secured my place to-day.

6. Q. To-day? A. Yes, sir.

7. Q. Where did you board previous to that? A. Brooklyn, 105 Hicks street, part of the time.

8. Q. How long have you boarded there? A. Whenever I am here, off and on.

9. Q. About how long, some months and years? A. While in town, some two or three years.

10. Q. Where are your things? A. Still in my trunk.

11. Q. In Brooklyn? A. Yes, sir.

12. Q. You have not moved your things? A. No, sir.

13. Q. But you intend to move? A. I intend to do so this day.

By Mr. Peabody.

14. Q. Have you a place of business? A. 89 Pearl street, New York city.

15. Q. How long have you had a place of business in the city of New York, sir? A. Since '66.

16. Q. Have you had a place of business in the city of New York all the time since '66 to the present time? A. Constantly.

17. Q. And have been in business all the time there? A. Yes, sir.

By Mr. Miller.

18. Q. What is your business there? A. I have an office there for the transaction of the Washington claim business, and also for the operation of a patent.

19. Q. Are you in business on your own account? A. My own account.

20. Q. Not as clerk or employee? A. No, sir.

Taken before me this 14th day of April, 1870.

I. T. Williams,
Register.

Blatchford, J.—As the Register has thought it proper to postpone the proof of claims made by members of the family of one of the bankrupts, amounting to thirteen thousand five hundred and forty-eight dollars and sixty-two cents, until an assignee is chosen, on the ground that he thinks that such claims ought to be investigated by the assignee, I do not think proper that the son of the bankrupt, of whose family such persons are members, should become such assignee. I therefore do not confirm or approve of his appointment.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where depositions for proof of debt had been transmitted from one to another Register.

Held, a Register is not bound to receive and file a deposition for proof of debt taken and certified before another Register. If an issue of law or of fact is raised or contested, he must adjourn the question into court for the decision of the judge.

In re BENJAMIN H. LODER.

I, EDGAR KETCHUM, one of the Registers of said Court in Bankruptcy, do hereby certify, that in the course of proceedings in said cause before me, the following question arose pertinent to the said procedings:

The bankrupt filed his petition in this court on the 27th of January, 1870. On the 19th of April, instant, four depositions for proof of debt, by Charles McMonagle, against the bankrupt's estate, were transmitted to me by another Register. The debt in each was alleged upon a promissory note of Benjamin Loder, payable to the order of the firm of Loder Brothers & Co., of which the bankrupt was a member, and indorsed by them, which, upon the maturity thereof, on the 4th of January, 1870, was presented for payment, which payment was refused, whereof the bankrupt's firm had due notice. The consideration was not stated, nor was it stated whether any and what payments had been made, wherefore I considered them defective and returned them for amendment.

It was thereupon claimed, on behalf of the creditor, that the Register who took the proof had certified their sufficiency, and that the Register in charge of the matter could not review or reject, but must receive and file them of course. It was also insisted that the depositions were sufficient and fully met the requirements of the 23d Section of the act. The following questions therefore are presented to the court:

First. Were the questions referred to sufficient without setting forth the consideration notes, and without stating whether any, and if any, what payments had been made?

Second. Is the Register to whom the matter has been refer-

red, bound to receive and file a deposition for proof of debt taken and certified before another Register, whether the same shall appear to him to be in conformity with the law?

Respectfully submitted by

EDWARD KETCHUM, *Register.*

BLATCHFORD, J.—The first question is answered in the negative.

The second question is answered in the negative.

The Register, acting as the court, is, under Section 22, to reject all claims not duly proved, but if an issue of law or of fact is raised and contested thereon by any party to the proceedings, the course prescribed by Section 4 in regard to adjourning the question into court for decision by the judge must be pursued.

SUPREME JUDICIAL COURT—MASSACHUSETTS.

On a motion to dismiss a petition to enforce a mechanic's lien in Massachusetts, on the ground that petitioners, on their own petition, had been subsequently adjudged bankrupts in the United States Bankruptcy Court,

Held, the mechanic's lien was not dissolved thereby.

The State court may entertain the petition without necessarily conflicting or interfering with the jurisdiction of the Bankruptcy Court. Motion to dismiss denied, and case ordered to stand continued to await the result of the action of that court.

In re JOHN Q. A. CLIFTON *et al. v.* DWIGHT FOSTER, *et al. Assignees.*

GRAY, J.—The petitioners, under an agreement with McKay & Aldus, furnished lumber which was actually used in the erection of a building upon land, both owned by the latter, and had, by the Gen. Sts., C. 150, a lien thereon to secure the payment of the debt due to them for such materials. On the 21st of December, 1868, within thirty days after they ceased to furnish the materials, they filed in the city clerk's office the certificate required by Section 5 of that statute; and on the 16th of February, 1869, within ninety days after they ceased

to furnish materials, they filed this petition to enforce their lien in the Superior Court for the county of Suffolk. On the 15th of December, 1868, McKay & Aldus filed in the District Court of the United States a petition for the benefit of the Bankrupt Act, and were adjudicated bankrupts; and on the 21st of January, 1869, the respondents were appointed by that court assignees of their estate. On these facts the respondents contend:

First. That the petitioners' lien is dissolved; and

Second. That if it has any validity as against them, it can only be enforced in the courts of the United States, and the State courts have no jurisdiction thereof.

The first objection was not strenuously urged, and is clearly untenable; for the Bankrupt Act, while it provides for the collection and distribution of all the assets of the bankrupt, and for vesting them in the assignee, recognizes and preserves all liens thereon. In Section 2 it declares that the jurisdiction of the courts of the United States, sitting in bankruptcy, shall extend "to the ascertainment and liquidation of the liens and other specific claims" on the assets of the bankrupt. By Section 11, the bankrupt is required to annex to his petition a statement of any existing lien or other security given for the payment of any debt, and an inventory of his estate, with a statement of any incumbrance thereon. By Section 14, the assignee has authority, under the direction of the court, to redeem or discharge any lien upon any property, real or personal, or to sell the property subject to the lien. And by Section 20, a creditor who has a lien upon real or personal property of the bankrupt, to secure the payment of a debt owing to him from the bankrupt, may be admitted to prove the balance of his debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by sale in such manner as the court shall direct; or may release and convey his claim upon the property to the assignee, and be admitted to prove his whole debt; and if the value of the property exceed the sum for which it is held as security, the assignee may release to the creditor the bankrupt's right therein

on receiving such excess, or may sell the property subject to the claim of the creditors thereon.

The second objection requires more careful consideration. Upon the institution of proceedings in bankruptcy, and the appointment of an assignee, all the property of the bankrupt passes into the custody of the courts of the United States, and cannot, while such proceedings are pending, be taken out of their custody upon any subsequent suit in the State courts. Pending the bankruptcy proceedings, therefore, no order could be made on this petition for the sale of the real estate, to satisfy the lien of the petitioners. *Nugent* v. *Boyd*, 3 How., 426; *Wiswall* v. *Sampson*, 14 How., 52; *Peale* v. *Phipps*, 14 How., 368; *Taylor* v. *Carryl*, 20 How., 583; *Foster* v. *The Richard Bustud*, 100 Mass., 411. It does not, however, follow that the petition must be dismissed.

The lien of a mechanic or material-man upon real estate is a statute lien, depending for its existence and continuance upon a strict compliance with the provisions of the statutes of the Commonwealth. *Hilliard* v. *Allen*, 4 Cush., 532.

These statutes create a lien as soon as the labor is performed, or the materials furnished and used: Gen. Sts., C. 150, Sections 1–4, therein differing from the statutes of New Jersey, as construed by Judge Blatchford: *In re* Dey. But they declare that it shall be dissolved, unless the creditor shall file a certificate thereof in the city clerk's office within thirty days, and begin a suit to enforce it within ninety days after he ceases to furnish the labor or materials; and specify the courts in which, and the form of proceeding by which such suit may be commenced and prosecuted. Sections 5, 7, 209.

The seasonable filing of such certificate and petition would seem to be necessary to keep the lien alive, whether it is ultimately to be made effectual in the State or Federal courts, and cannot be deemed encroachments upon the authority of the latter. *In re* Bininger, 3 N. B. R.

It is possible, indeed, that after the institution of bankruptcy proceedings, a petition to the United States Court in bankruptcy, within ninety days, might be held by that court equiv-

alent to the filing of a petition in the courts of the Commonwealth. But in the absence of any decision of any court of the United States to that effect, we cannot safely assume that such would be the construction.

The cases in the United States courts for the Northern District of New York, cited for the respondents, are quite different from this case. *In re* Vogel, 2 N. B. R., 138, 427, and 3 N. B. R., 49, 198, the sheriff, who was ordered to deliver up goods of the bankrupt, had taken them on a writ of replevin from a State court, after the filing of the petition in bankruptcy, and the surrender of the goods by the bankrupt to the Register. *In re* The New York Kerosene Oil Company, 2 N. B. R., 164, 528, and 3 N. B. R., 31, 125, in which the court granted an injunction to restrain a suit brought in the State court to foreclose a mortgage of real estate after the commencement of bankruptcy proceedings, the validity of the mortgage was denied, and the foreclosure, if ordered, might vest the property in the mortgagee. It may also be remarked that the Supreme Court of the United States held, *in re* Peck *v.* Jenniss, 7 How., 624, that the courts of the United States had no authority, under the Bankrupt Act of 1841, to issue injunctions to the State courts, and has not yet passed upon the question whether any greater authority in this respect is conferred by the act of 1867. *In re* The Pacific Mail Steamship Co., 2 N. B. R., 170, 553, the District Court of the United States, sitting in bankruptcy, stayed a suit in the same court sitting in admiralty, to enforce a lien upon a vessel not dependent for its existence upon such a suit, and which could be as well ascertained and liquidated in bankruptcy as in admiralty.

Under the provisions of the Bankrupt Act already cited, the courts of the United States, sitting in bankruptcy, may indeed authorize the assignee to redeem the property and discharge the lien, or they may order the entire property to be sold, and ascertain the amount of the debt secured by the lien, in which case that debt would be preferred in the distribution of the proceeds, and the purchaser of the estate would take it discharged of all incumbrances. *Houston* v. *City Bank*, 6 How.,

486; *Fowler* v. *Herst*, 13 How., 373; *Wiswall* v. *Sampson*, 14 How., 52; *Pulliam* v. *Osborne*, 17 How., 476; *In re* Barrow, 1 N. B. R., 125, 481; *Foster* v. *Ames*, 2 N. B. R., 147, 455. But, on the other hand, those courts may, in their discretion, without investigating the validity or the extent of the lien, allow the assignee to sell the property subject to the lien, and the bankrupt's estate to be finally settled, without any determination of the rights claimed under the lien; in which case the petitioners would retain those rights as against the purchaser of the property. *Wiswall* v. *Sampson*, 14 How., 67; *Briggs* v. *Stephens*, Law Rep., 281; *In re* McClellan, 1 N. B. R., 91, 389; *In re* Bowie, 1 B. R., 185; *Foster* v. *Ames*, 2 N. B. R., 148, 455. If the courts of the United States sitting in bankruptcy should abstain from ascertaining the amount of the lien, and providing for its satisfaction out of the property, or the proceeds of a sale thereof, the only way of enforcing it would be under the present petition.

The rights of the creditor will be preserved, and all interference with the custody or the jurisdiction of the national courts avoided by ordering this petition to stand continued in the Superior Court, to await the result of the action of the courts of the United States in the proceedings in bankruptcy.

Case to stand continued.

L. W. Osgood and *S. F. Keyes*, for the petitioners.

D. Foster and *G. W. Baldwin*, for the respondents.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A witness cannot refuse to answer questions concerning his dealings, etc., with the bankrupt, on the ground that his answer may furnish evidence against him in a civil case, brought or to be brought on behalf of the assignee.

In re G. P. & B. W. Fay.

A QUESTION arose in this case upon the examination of E. Ira Richards, as a witness before Register Jewett.

It appeared that Richards took the oath as a witness before the Register on the 8th of May, 1869. The examination was, however, postponed from time to time, until January, 1870. While the examination was still unfinished the assignee commenced a suit against Richards in the Circuit Court, in which he sought to recover a large sum of money, which he alleged had been received by Richards.

Richards now denied the right of the Register to continue the examination while the suit against him was still pending, contending that he could not be compelled to give evidence against himself. By the request of parties the question has been certified to the District Judge.

LOWELL, J.—The witness cannot refuse to answer questions concerning his dealings, etc., with the bankrupt, on the ground that his answer may furnish evidence against him in a civil case, brought or to be brought on behalf of the assignee. The main, if not the only, purpose of the statute authorizing such an examination is to enable the assignee to obtain evidence for civil suits, or to ascertain that there is no such evidence.

UNITED STATES DISTRICT COURT—LOUISIANA.

Where a valid mortgage of a plantation was made in Louisiana to secure advances of cash and supplies, to be made from time to time, for the purpose of working it, not to exceed in amount twenty-five thousand dollars, to be reimbursed out of its products; and advances were made to exceed fifty thousand dollars, and reimbursements to an amount that, however, left a balance due exceeding twenty-five thousand dollars,

Held, the mortgage is good as security to its full amount, on any balance remaining on advances and reimbursements under it, and is not extinguished by the reimbursement of the first twenty-five thousand dollars.

A mortgage given to secure the payment of four promissory notes, made to raise means to work a plantation, is valid, and, upon the negotiation of the notes, relates back to the date of execution.

In re YORK & HOOVER.

DURELL, J.—In the month of February, 1869, two plantations, surrendered by the bankrupts, and designated as "White Hall"

and "Home Place," were sold free of incumbrances, under the order of this court.

In March, 1869, a rule was taken by the assignee calling upon the creditors of the bankrupts to show cause why said sales should not be confirmed, and the proceeds thereof distributed in accordance with the priority and rank of the mortgages, privileges, and liens existing at the date of the surrender.

Upon the return of this rule, W. A. Ober, the purchaser at the sales, demanded a confirmation of the same; and the commercial firm of Ober, Atwater & Co. asserted themselves to be creditors of the bankrupts, secured by mortgage, first, in priority and rank, upon the property sold. The claims of Ober, Atwater & Co. were disputed by others of the creditors of the bankrupts, and the whole matter was referred to a commissioner, with instructions to inquire into the regularity of the sales, which certain creditors also impunged, and to determine the order and rank of the mortgages resting upon the respective plantations.

In June last the commissioner made a voluminous report upon the law and facts of the case, confirming the sales, and sustaining the validity and priority in rank of the mortgages held by Ober, Atwater & Co. To the confirmation of this report exceptions were taken, and, subsequently, fully argued by counsel representing all parties in interest. The sales having been adjudged to be valid at a previous day of this term, it only remains for the court to determine the relative rank of the respective mortgages.

The mortgages on the respective plantations being distinct, will be separately considered.

First. As to the mortgages upon "White Hall."

On the 17th of January, 1866, York & Hoover made an authentic act of mortgage, in which it is recited "that being in want of cash and supplies to carry on the cultivation of that certain plantation, known as 'White Hall,' and also the 'Home Place,' belonging to them, they have applied to Ober, Atwater & Co. for such advances of cash and supplies, who have agreed

to advance the same, at such times, and in such manner as the same may be needed, to an amount not to exceed twenty-five thousand dollars, on the terms and conditions hereafter expressed." The conditions on the part of York & Hoover to be performed, were, to cultivate the plantations with diligence; to apply the advances to the use of the plantations; and upon the crops being gathered, to consign the same to the mortgagees for sale, who, out of the proceeds thereof, were to repay to themselves "all such advances as they shall at such time have made," together with commissions, costs of sale, interest, etc.

Ober, Atwater & Co. agreed to make the advances, and, to represent the same, received from York & Hoover a negotiable note in the sum of twenty-five thousand dollars, payable on the 1st day of January, 1867. After these recitals, the act proceeds to declare "that to secure payment of all said advances which the said Ober, Atwater & Co. may make as aforesaid, and such sums of money as may be due to them as aforesaid, under this contract, the said York & Hoover specially mortgage the 'White Hall' plantation." The act finally declares that all accounts accruing under it shall be due and mature on the 1st January, 1867. This mortgage was executed and inscribed before the execution and inscription of the mortgage given to Wright & Allen, under which last mortgage the opposing creditors claim.

The only question to be determined, then, is, whether Ober, Atwater & Co. have, within the terms of this mortgage, produced a valid, operative, and existing obligation. The testimony shows that during the year 1866, advances were made to the two plantations to an amount exceeding fifty-three thousand dollars; that during the year, payments were made exceeding twenty-five thousand dollars; and that in January, 1867, a balance existed, including commissions, of over twenty-seven thousand dollars. The opponents contend that the contract of Ober, Atwater & Co. was fulfilled when advances had been made to the amount of twenty-five thousand dollars; and that this mortgage was extinguished when they had received a like sum from the crops of the plantation. Ober, Atwater & Co.

maintain, on the contrary, that their mortgage secured whatever might remain in January, 1867, as a balance on the account of advances made to them.

The language of the act of mortgage, the character of the instrument, the conduct of the parties to the contract, and the judicial decisions, support this conclusion of the mortgagees. The mortgage was executed to secure advances to be made during the year; the settlement of accounts was postponed until the expiration of the year; and whatever advances were made the mortgage was designed to stand as a security for to the extent of twenty-five thousand dollars.

The case of *Lawrence* v. *Tucker*, 23 How., S. C. Rep., p. 15, is strictly analogous to the one now before the court.

In that case a note was given for the sum of five thousand five hundred dollars, contemporaneous with the mortgage as a debit; but in truth, as a collateral security for advances made. The mortgage was given to secure such advances of money as had been, or might be made, within two years, to the mortgagors, not to exceed six thousand dollars in addition to the note, making a sum total of eleven thousand five hundred dollars.

It appears from the report, that within the two years, from fifty thousand to one hundred thousand dollars were advanced; and that, at the expiration of the term, nearly ten thousand dollars were due on said advances from the mortgagors to the mortgagee. The objections having been made in that case, as in the one now before the court, that the mortgage was not given to secure a balance on the settlement of accounts to the amount stipulated in the mortgage, but only to secure first advances to the amount of the note, and six thousand dollars—to wit, eleven thousand five hundred dollars; and that the payment of that sum by the mortgagor to the mortgagee, in the course of their transactions during the term of the two years, was a ratification of the mortgage; the Supreme Court said, "Our object has been to show that the parties to the original transaction understood it alike, and acted upon it accordingly: that there never was a difference of opinion

between them as to the character of the mortgage and its purposes; and that it was intended to be a security for, and a lien upon, the property mortgaged, for future advances to the extent of the sum provided for in it. * * * We consider it to be a mortgage for future advances; that they were subsequently made in conformity with its provisions; and that the proofs that they were so, were rightfully received by the court below to substantiate them."

In the case now before the court, similar proofs were submitted. The accounts current, the act of liquidation, the testimony of the parties to these accounts, all show an intent corresponding to that which the mortgage itself suggests.

The case of *Lawrence* v. *Tucker*, in the Supreme Court of the United States, is supported by other decisions of that court, cited in the opinion delivered in the case; and also by the decision of the Supreme Court of Louisiana, *in re Pickersgill* v. *Brown*, 7 A., 298, decided under the regime of the Code of the State.

Therein it was determined that a mortgage for advances to be made from time to time, during a definite period, for a specific amount, is a security for the eventual balance in account. That it is not affected by the fluctuations in the account at different periods in the time limited; and that the inscribed mortgage, declaring the nature of the transactions, the time within which they are to accrue, and the limit to which the mortgage debit may reach, afford a sufficient notice to all parties, so as to place them on their guard.

These doctrines have been maintained in the French courts under the regime of the Code Napoleon, many of whose decisions are cited in the very able and learned report of the commissioner; and they are fully recognized in the highest courts of other States of the Union. Vide 5 Metcalf, 268.

Second. As to the mortgages upon the "Home Place."

The mortgages upon the Home Place plantation bear date of the same day—to wit, January 20, 1866. One was made in favor of Alexander Allen, acknowledging a debit for supplies furnished the plantation; and to put said debit in a negotiable

form, four notes were drawn in the sum of five thousand dollars each; payable to the makers, York & Hoover, indorsed in blank, bearing interest from date, and maturing in the following fall and winter. These notes are recited in the mortgage, and, thus secured, are payable to any future holder thereof. Another or second mortgage, bearing even date with the first, but inscribed one day later, was given to Messrs. Wright & Allen, factors and merchants, who had become liable for the mortgagors in large sums, as securities, as indorsers, and otherwise; which sums the mortgagors wished to discharge. For that purpose they made numerous notes, recited in the mortgage and negotiable in form, which were put into the hands of Wright & Allen, to be used solely in the discharge of their said liabilities, incurred by indorsements or otherwise. Wright & Allen, the factors and merchants of York & Hoover, had been consulted by them, in reference to their mutual business relations; and it was by the advice of Wright & Allen that York & Hoover made the mortgage first above described, and first inscribed. It was made to enable York & Hoover to raise money to work their plantations, "White Hall," and "Home Place."

The notes were made to be negotiated in the market, and the mortgage was made to give additional credit to the notes. They were all negotiated for value before maturity, two of them in March, and two in August of 1866.

The opposing creditors contend that these notes are not protected by the mortgage. That at the date of the inscription there had been no negotiation of the notes, and that, therefore, there was no debt due; and that none was created until several months subsequent thereto. But the mortgagors' purpose was to raise money by a loan, and, preparatory thereto, these notes were made, a mortgage declaring the existence of a debt executed and inscribed, and both mortgage and notes placed in the hands of an agent for negotiation. It may be true that the mortgage and the notes were inchoate securities, framed to accomplish a particular object, and that a negotiation by the mortgagor or his agent was necessary to their complete validity.

It may be that, until then, there was no creditor, no debtor, no right of action, nor perfect obligation; but the agent, from the date of the inscription, was in possession of all the means to the making of a perfect contract, by the delivery of the securities to a *bona fide* holder. These securities, by such a delivery, became operative from their date, and are binding, *ab initio*, upon the mortgagor. The Civil Code of Louisana, Art. 3259, provides, "that a mortgage may be given for an obligation which has not yet risen into existence;" and cites as an illustration, "as when a man grants a mortgage by way of security for indorsements which another promises to make for him." C. C., 3259. A more apt illustration, and one that arises more frequently in practice is, "as where a man makes notes negotiable by delivery, and secures them by an inscribed mortgage, and places them in the hands of a broker for sale for his account." If the debtor may grant a mortgage to secure notes that have not been negotiated, but which he contemplates negotiating, with a friend's indorsement, why may he not, in the same manner, provide for the credit and payment of his own notes, prepared for negotiation, when the principle is admitted that a mortgage can be given for an obligation which is only proposed, or which has not risen into existence? The intrinsic validity of the mortgage under consideration is admitted. Article 3260, of the Code, declares the operative force of such a mortgage. "The right of mortgage shall only be realized in so far as the promise shall be carried into effect, by the person making the promise to indorse, or, as in the case supposed, by the actual and *bona fide* transfer of the notes. But the fulfillment of the promise to indorse," continues the article quoted, or, as in the case supposed, the negotiation of the notes of the mortgagors, "shall impart to the mortgage an effect relating back to the date of the mortgage."

The French authorities support the conclusion that the mortgage takes effect from the date of the inscription, and not from the date of the realization of the loan. The French Judicial decisions show a clearer and deeper knowledge of the necessities of a commercial age and people than do the theories of

the late illustrious president of the Court of Cassation, and of others of their great commentators, which they overrule.

In *Telemez* v. *Bonifay*, Sir. and Vill., 1842, Part 2, p. 520, the Court of Cassation say:

"L'hypothèque stipulée pour sureté d'un crédit ouvert prend *rang du jour de son inscription* pour toutes les sommes fournies en vertu de ce crédit, et *même pour celles qui n'ont été fournies que postérieurement aux inscriptions prises par d'autres créanciers.* Il y a, dès le jour même du contrat, obligation réciproque: *obligation de la part de celui qui ouvre le crédit, de faire les avances promises;* de la part du crédité, de restituer les sommes qu'il prendra en vertu du crédit. Si cette obligation est conditionnelle, elle n'en est pas moins une obligation à laquelle peut se rattacher une hypothèque. La condition accomplie a un effet rétroactif au jour auquel l'engagement a été contracté, et cette hypothèque prise en vertu du crédit ouvert *prend rang du jour de son inscription, et non du jour de la réalisation du crédit, et prime en conséquence les hypothèques inscrites intermédiairement entre le jour du contrat portant ouverture du crédit et hypothèque, et celui ou le crédit a pu se réaliser.* Il n'y a aucun préjudice des droits des tiers, *puisque par l'inscription* les créanciers sont suffisamment avertis que si la condition s'accomplit, c'est-à-dire *si le crédit se réalise, l'hypothèque prendra rang du jour de son inscription.*

The same doctrine is again declared by the same court in the same volume, Part 2, p. 541, in *Hutte* v. *Seignan.* See also *Hilderbrand* v. *Courcelles*, Sir. and Vill., 1848, Part 2, p. 729, and note; in which it is stated that this decision is in accordance with uniform jurisprudence, and the opinion of the majority of the authors, though the contrary had been maintained by Merlin, Toullier, and Troplong.

The Supreme Court of Louisiana also shows a decided preference for this doctrine; 7 A., 297; 16 L., 370; 18 A., 235. And a corresponding disposition is exhibited in the American Chancery Reports. 7 Conn. R., 387; 24 Conn., 290; 4 John. Ch. Rep., 65, 74; 2 Cowen, 246.

That the mortgage for the four notes, the mortgage first inscribed, is not a nullity, but a valid security for the notes in the hands of holders for value, has been shown. It is to be inferred that Wright & Allen, the persons named as mortgagees in the mortgage of the same date, bearing upon the same property, but last inscribed, had notice of the mortgage for the four notes and consented to its prior inscription in order to give to it the priority of lien thence arising.

There is no evidence showing at what time the holders of the notes described in the mortgage last inscribed became parties in interest; and we find no evidence that any party attempted to restrain the negotiation of the four notes secured by the first.

During the year 1867, Ober, Atwater & Co. continued to furnish supplies and to make advances to York & Hoover. Upon the accounts as stated, it appears that there is due to them more than the amount of the notes embraced in the mortgage. The payments, from whatever source derived, do not cover the balances due.

The sum bid for the "Home Place" was nineteen thousand eight hundred dollars, and for "White Hall" the proceeds amount to twenty-two thousand dollars. The expenses and costs of the sales must be deducted from these funds, together with such expenses of the estate as are commonly chargeable against it.

DECRETAL ORDER.

This cause came on to be heard on the pleadings and proofs and arguments of counsel for the various creditors, and thereupon it is declared by the court, *First*, that the commercial firm of Ober, Atwater & Co. have established their right to the mortgages and mortgage debts specified in the two mortgages filed by them, one on the "White Hall" plantation, dated 17th of January, 1866, and inscribed the 9th of February, 1866, for the security of advances for twenty-five thousand dollars, to be due 1st of January, 1867, and which sum was advanced. And one upon the "Home Place" plantation, executed the 20th of January, 1866, and inscribed the 16th of February, 1866, to secure

the payment of four notes therein described. And that these mortgages have a prior lien upon the proceeds of the sales of the said plantations, and must be paid in preference to any of the mortgages which have been set up in the oppositions of the creditors of York & Hoover.

Second. It is further ordered, decreed, and adjudged, that the moneys arising from the sales of the said "White Hall" and "Home Place" plantations be paid to the said Ober, Atwater & Co. upon their several mortgages as aforesaid, to the extent of the moneys applicable, and that each mortgage be credited with the money derived from the property declared in it.

Third. The assignee is directed to charge the said funds in his hands with the costs and expenses of the sale, and orders relative thereto, and their proportion of the general expenses of the estate.

Fourth. That the costs of the litigation upon the regularity of the sale, and upon the oppositions to the rule by the assignee, be paid by the opposing creditors.

UNITED STATES DISTRICT COURT—NEVADA.

Held, 1. That to entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, on oath, or solemn affirmation before the proper Register, or commissioner, setting forth the demand, the consideration, etc., etc.

2. That if the statement of the consideration is so general and indefinite as to afford no aid to the creditors in their inquiry as to the fairness and legality of the claim, it does not effect the object of the law, and must be held insufficient. The kind of goods, the quantity, the price, and the time of sale and delivery should be stated.

3. That the Register has the right to permit or require the deposition to be amended.

4. That where a note is payable *in coin* the demand should be entered upon the books of the assignee as payable in the stipulated currency.

5. Where a claimant against a bankrupt's estate illegally increases the amount of his claim, or where a portion of the consideration is good, and a portion illegal, he will not be allowed to separate the good from the bad and prove his claim under the Bankrupt Law.

In re The Estate of GEORGE ELDER.

HILLYER, J.—George Elder was adjudged a bankrupt on his own petition on the 30th day of October, A.D. 1869.

On the 25th of November, Henry Vansickle made proof before the Register of a debt against Elder's estate amounting to seventeen thousand and twenty-five dollars and forty-nine cents. No objection to the proof was made before the Register.

Subsequently, the Register being about to transmit the list of claims proved to the assignee, for the purpose of paying a dividend declared, Randall & Fox, two creditors of the estate, petitioned this court to have the claim of Vansickle disallowed and rejected, except as to the sum of one hundred and twenty-six dollars and twenty cents, upon the following alleged grounds, viz.:

First. That the deposition of Vansickle, made in proof of his claim, does not state or set forth any consideration for any portion of said claim except said one hundred and twenty-six dollars and twenty cents.

Second. That said claim is founded in fraud and illegality, in this, that there was not due said Vansickle, at the time of making his proof, from said bankrupt, or said estate, any sum above six thousand dollars, and that this was well known to Vansickle when he swore to his proof.

Upon the day set for hearing, Vansickle, by leave of the court, amended his proof by stating, or purporting to state, a consideration for his claim. To the amended proof Randall & Fox urge the same objections made against the original.

The objection to the original proof was well taken, and the claim must have been rejected if it had not been amended.

The bulk of the claim is evidenced by eight promissory notes, and the statement of the consideration for which the first note was given, is as follows:

"That between the 13th day of April, A. D. 1865, and the 13th day of April, A. D. 1866, deponent sold and delivered to said George Elder, at Genoa, Douglas county, hay, barley, and merchandise, and furnished board to said Elder for the agreed price of two thousand three hundred dollars United States gold coin."

The consideration of the other seven notes is stated in substantially the same manner.

To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, on oath or solemn affirmation before the proper Register or Commissioner, setting forth

The demand,

The consideration, and other matters not necessary to notice now; "and no claim shall be allowed unless all the statements set forth in such deposition shall appear to be true." (Bankrupt Act, Sec. 22.)

This proof, if satisfactory to the Register, is to be delivered to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and register in a book "the amount and nature of debt." (*Ibid.*)

Certainly the consideration ought to be so stated that the assignee, upon comparing the claim and books, can determine whether the claim proved and the books, agree. And here it is proper to notice what appears to be a serious defect in the Bankrupt Act. In this case, at the creditors' election, Henry Vansickle was chosen assignee. Now, is it to be expected that, if there be any illegality or fraud in his claim, he would compare it with the bankrupt's books, or apply to the court to have it rejected under Section 22, or that, if his claim should be rejected, he would, after appealing, plead and answer his own statement under Section 24? It is far more likely that he would make use of his own position to cover up the fraud or illegality, if there was any.

In order to secure perfect fairness and impartiality, the assignee should either be an officer of court or selected from among other persons than creditors of the estate.

But what was the object of the law-maker in requiring the consideration to be stated in the deposition? The answer to this will help to ascertain how particular the statement of it must be. One object, no doubt, was to enable the Register to say whether it is legal in its nature, and will support a demand or promise. Another, to show him whether or not the demand is unliquidated, and must be ascertained by assessment, before its allowance. Another, to afford the assignee means for com-

paring the books of the bankrupt with the proof. But the chief object, no doubt, was to put a check upon the proof of fraudulent and fictitious claims, by requiring the claimant to give such a particular and definite statement of the consideration as would enable other creditors to trace out, discover, and expose the fraud or illegality of the claim, if any existed.

The requirement is intended to be for the benefit of all other creditors of the estate and the bankrupt, and to prevent fraud.

If the statement of the consideration is so general and indefinite as to afford no aid to the creditors in their inquiry as to the fairness and legality of the claim, it does not effect the object of the law, and must be held insufficient.

Touching the question now being considered, I can find no adjudications directly upon this part of the Bankrupt Law. I must, therefore, be guided by the evident purpose of the law, and such decisions, in analogous cases, as may throw light upon the question.

Upon a confession of judgment in California and New York, a statement is required which must "state concisely the facts out of which the indebtedness arose, and shall show the sum confessed therefor is justly due." (Pr. Act, Cal., Sec. 374; 3 R. S., New York.) Under this provision it is held that the failure to state the amounts due severally for goods and for money, itself would be fatal. Such an averment would be insufficient in a complaint. (*Cordier* v. *Schloss*, 18 Cal., 576.) The mere statement that the debt is by note, is insufficient. (*Ibid.*, *Plummer* v. *Plummer*, 7 How. Pr. Rep., 62.) In *Plummer* v. *Plummer*, 7 How. Pr. Rep., 446, the amount of the debt was stated, and then that it arose out of the following facts: "For goods, wares, and merchandise sold and delivered to me by Messrs. Schoolcraft & Co., Albany, of which firm plaintiff is a member; the goods were purchased by me in the years 1851 and 1852." The Supreme Court of New York says of this statement:

"This is far short of a compliance with the statute. One important object was that other persons than parties to the judg-

ment might, by reference to the statement, be informed of all the material facts relating to the indebtedness, and thus detect fraud, if any.

"The statement is much too general; no essential beneficial purpose would be answered by such a statement as to the nature, consideration, and origin of the debt. The kind of goods, wares, and merchandise, the quantities, the prices charged for them, the times or near the times in the years stated when the purchases were made, ought to be shown."

The New York statute regulating confessions of judgment by warrant of attorney, requires "a particular statement and specification of the nature and consideration of the debt or demand on which such judgment is confessed," and it was held that a specification so general as a common count, was not sufficient; that it ought to be as particular and precise as a bill of particulars. If for goods sold, the kind, quantity, and price of the goods and the time of sale, as in a bill of parcels. (*Lawless* v. *Hackett*, 16 John., 149.)

The Court of Appeals held this language to be applicable to a statement under the first-mentioned law. (*Chappel* v. *Chappel*, 2 Kirnan, 215.)

In this case, the confession or statement stated that the debt arose out of a promissory note. This was insufficient, the court saying, "the statute looks not to evidence of demand, but to the facts in which it originated; in other words, to the consideration which sustains the promise." To the same effect as the foregoing, numerous other cases might be cited. All of them treat the words "fact out of which the indebtedness arose," as equivalent to "consideration," as was done in the case last cited.

Regarding the object of these State laws as identical with that of Section 22 of the Bankrupt Law, these decisions are entitled to weight. Indeed, the purpose of the framers of the Bankrupt Law to secure in every proceeding under its provisions the utmost honesty and good faith on the part of the bankrupt and creditors, is disclosed in almost every section. The deposition required of a claimant on proof of his debt, by Section 22, is much more searching, and descends more into

particulars, than the statement on confession of judgment, before noticed. All the statements set forth in the deposition must appear to be true. That is, as I understand it, the facts must be stated with so much certainty, particularity, and detail, as that upon its face, without extrinsic proof, the deposition shall appear to the Register to be true. The more the deposition goes into details of time, place, quantity, and price, the more it will appear to be true, and the less likelihood there will be that a fraudulent or illegal claim will be presented, or if presented, allowed; for the deponent seeking to prove an illegal or fraudulent claim will always take refuge in generalities, and will reconcile the oath with his conscience by some specious reason, knowing the difficulty of convicting him of falsehood when subjected to an examination. But if he must make oath as to time, place, quantity, quality, price, etc., he will not be likely to state anything but the truth, for every detail stated increases the probability of detection, if it be untrue.

Let a claimant, for instance, swear that the bankrupt is indebted to him in a certain amount, that this debt is evidenced by a promissory note, and that the consideration is hay furnished to the bankrupt, without further particulars, and that the amount is justly due. Every statement might, in one sense, be true, and yet the whole claim be simulated and false, and gotten up expressly to give to the claimant a preference. The claimant would swear the amount was justly due, because the debtor had given him his promissory note, and that the consideration was hay, although the quantity might be so small as to show fraud, if duly stated, and have been given for the purpose of enabling the claimant to flatter himself that he was swearing to the truth.

I have gone thus at length into this question, because it is new in this court, and because it is important now that a rule should be fixed which is correct, and as certain as the nature of the case will admit, for the infinite variety of considerations which will support a promise renders it impracticable to state an inflexible rule, or anything more than the principle to be applied to all cases.

Looking, then, at the object of the law, and the reasons for requiring a statement of the consideration in the deposition, I consider that a general statement that the consideration of a demand is goods, wares, and merchandise, or hay, barley, and board, is not sufficient; that the kind of goods, the quantity, the price, and near the date of sale, should be stated; that the quantity of hay or barley, the price, and the time of delivery, if delivered at one time, or, if delivered continuously through a period of time, that period should be stated. If the proof falls short of this, the Register ought not to consider it satisfactory, and should withhold his approval. He has the right, and it is his duty, to permit and require the deposition to be amended, subject always to the provision of Section 4, which requires all issues of law or fact, raised and contested by any party to the proceedings, to be adjourned into court for decision.

If the proof is not satisfactory to the Register, it should be made so before it is signed by the deponent or transmitted to the assignee.

Where, as in this case, the proof has been passed as satisfactory by the Register, and the question of due proof or not comes up before the court, upon the application of creditors to have the claim rejected, if the evidence taken before the court shows the consideration to be legal and sufficient, the claim will not be rejected. Such I consider the fair construction of the last clause of Section 22. If defects in the deposition have justified the application, costs can be imposed upon the party in fault.

Tested by the above rule, neither the original nor amended deposition of Vansickle is sufficient. Whether the proof taken before the court has shown the consideration of his claim to be fair and legal, will be determined in considering another branch of this case.

It is alleged by the creditors that note No. 8 is illegal. This note was given by Elder on the 29th day of October, the day before the petition of Elder was filed, as is said, for balance of account due that date.

It appears from the books and other testimony, that from the 20th to the 29th of October, Elder was charged on the books of Vansickle double the prices for hay, oats, and barley, that other customers were, and that those charges were made on a currency basis. A charge appears on the blotter, dated October 29, to Elder, for two hundred and thirty-four dollars and eighty cents worth of feed, the whole of which is included in this note.

The testimony shows that this was the estimated amount of feed which would be used by Elder during the remainder of the month of October, and had not, at the time of the making of the note, been delivered, and that a large portion of it (more than one-half) never was furnished to Elder. The double price was charged in pursuance of an agreement made between Lynds (Vansickle's agent) and Elder. By reason of the double price charged, changing in currency, and the including of the hay and grain not furnished, the amount of this note is more than doubled.

I think the testimony shows a large portion of the consideration of this note to be founded in illegality; and in accordance with a well-settled principle of law, this illegality of a part of the consideration makes the whole note void and unavailable, so far, at least, as the interests of creditors are concerned. (1 Parsons on Con., p. 380.)

Note numbered 7, given October 19, for the sum of eight hundred and fifty-five dollars and fifty-seven cents, is for a balance of account which amounted, at that time, as shown by Vansickle's ledger, to six hundred and forty-one dollars and sixty-three cents. The explanation given for this difference is, that the charges were made on the book at coin rates, and when the note was taken one-third was added to the account to make the note, payable in currency, the equivalent of six hundred and forty-one dollars and sixty-eight cents in coin. This note also includes in its amount thirty-five dollars and twenty-nine cents interest, improperly and illegally charged in the account against Elder.

No direct proof was made of a specific agreement by Elder

to pay coin, nor is there anything to establish such agreement beside the presumption arising out of the fact that business in this State is generally done on a coin basis. In the absence of a contract stipulating in terms for payment of gold or silver, this book account was payable in currency.

To allow a debtor, on the eve of bankruptcy, to do what was done here, would lead to abuse, and enable a debtor, by raising the demand of a creditor one-third, to give such a creditor a preference over less favored. Suppose that another creditor had a claim on book account for six hundred and forty-one dollars and sixty-eight cents, and the bankrupt refuses to make any note or agreement to pay in coin, or to raise it to such basis. This creditor can prove only six hundred and forty-one dollars and sixty-eight cents, while the preferred one, who gets the currency note, proves and receives dividends on eight hundred and fifty-five dollars and fifty-seven cents. The latter then receives a preference equal to the dividend on the difference, two hundred and thirteen dollars and eighty-nine cents.

I consider that Vansickle has illegally increased the amount of this portion of his claim, and it must be rejected for this illegality.

So far as the notes numbered 3, 4, 5, and 6 are concerned, if there was nothing against their validity, except the fact that they had been changed into currency from coin notes, which expressly stipulated for payment in coin, I should hold them to be valid. The better and correct practice, where a party has a demand by its terms payable in coin, is to prove it according to its terms.

The demand should then be entered on the books of the assignee as payable in coin, and the claimant would be entitled to receive his dividend thereon in the stipulated currency. The correctness of this rule is established, in my judgment, by the decision of the Supreme Court of the United States, in the case of *Bronson* v. *Rhodes*, 7 Wall., 229, where it is held, that "an express contract to pay coin dollars can only be satisfied by the payment of coin dollars," and that "when contracts made payable in coin are sued upon, judgment may be rendered

for coined dollars and parts of dollars; when made payable in dollars generally, without specifying in what description of currency payment is to be made, judgment may be entered accordingly, without such description."

Note numbered 2, for two thousand three hundred dollars, dated at Genoa, April 13, 1866, and note numbered 1, for one thousand three hundred and fifty dollars, dated at Carson City, June 7, 1867, both bearing two per cent. interest per month, and payable in gold coin, the petitioners say are founded in fraud and illegality, and nothing else.

Giving due regard to the presumption of honesty which is made in favor of any one at the outset, after carefully and anxiously considering all the facts and circumstances proved, I am forced to the conclusion that these notes are illegal and fraudulent. I shall not attempt to state all the circumstances tending to this result, but will notice some. First, the two notes, although purporting to have been made at different towns, and in different years, are both written on what was, it is admitted, once one piece of paper. The notes themselves when examined show this. All of the experts agree that the two pieces of paper on which these notes are written were once one; that they appear to have been written under the same conditions, at the same time, with the same pen, the same ink, and by the same person. No satisfactory explanation was given of these circumstances.

Elder says the notes were written and given to Vansickle on the days they bear date. Vansickle says, that he did not see either of them written; that Elder brought them to him, one in Genoa, the other in Carson; that he did not have the Genoa note with him when the Carson was given to him; that it was at that time at home in his safe. The consideration of these notes is stated generally by both Vansickle and Elder to be hay, barley, blacksmithing, and on account. The books containing this account are not produced, although Vansickle says that some of them could be, while others have been lost or destroyed.

Cosser speaks of seeing Elder give Vansickle a note in April

or May, 1866; says Vansickle and Elder were talking about money matters; that Vansickle told Elder he wanted a note; gave Elder a sheet of plain writing-paper, and Elder wrote the note, handed it to Vansickle, who folded it up and put it in his pocket.

Van Cott says, that a year ago he saw notes similar in appearance to these and same amount, in Vansickle's safe. Blunt says, that in 1868 Van showed him a note against Elder for two thousand dollars and upwards, and told him he had many of that denomination.

Vansickle testifies, that the note first given was not then stamped, that the second was not properly stamped, and that he put stamps on them at some time before Elder went into bankruptcy, but does not know when.

Elder says the second note was stamped by Van in Carson, and that he saw it afterwards, and canceled the stamps himself; that the first note was not stamped for over a year after it was given.

Taylor swore that he worked for Vansickle eighteen months prior to June, 1867; that he had examined the old books; that there was no account against Elder for more than sixty dollars, as he thinks; that he had access to the safe; had seen there notes of Mallory, Thompson, Noteware, and others, but never any note against Elder.

Wencke, another bookkeeper, testifies that he never heard of this old debt against Elder as late as October 19, 1869.

In the spring of 1868, Vansickle told Barker that Elder owed him one hundred and fifty or two hundred dollars; said nothing about these notes. In February, 1869, Vansickle told Bruso that Elder would owe by the 1st of March about seven thousand dollars, while if these notes are included the true amount was over eleven thousand dollars. About the 20th of October, 1869, Vansickle told Mallory that Elder owed him seven or eight thousand dollars, while if these notes were counted the true amount would have been thirteen or fourteen thousand dollars.

To all this must be added the testimony as to the circumstances before and after the filing of his petition by Elder.

Ten days before, Elder renews the three coin notes, giving currency notes in exchange as their equivalent, the computation being made on the basis that currency was worth seventy-five per cent. of coin; the interest of the new notes was double that of the old. Vansickle at the same time buys a claim against Elder of Farrell, raises the amount of that to currency, and takes a new note of Elder. At the same time, knowing Elder was about to break up, and for the purpose, as the witness Lynds says, of driving Elder away, Vansickle commences charging Elder double prices for everything furnished him, and takes the notes (No. 7 and 8) under the circumstances before stated, the last one the day before Elder filed his petition, and containing an estimate of what the teams would use during the rest of the month; Vansickle saying, as one witness testified, that the teams would need that much before anybody else got them.

The witness Wencke testifies that this was done because Elder was going to break up; that the double charges were made with a view to Elder's bankruptcy, and to secure a larger percentage, and gives the same reason for changing the coin notes into currency.

Vansickle being chosen assignee, and about to sell the teams, went, on the morning of the sale, to Mr. Crosby, and wanted he should buy in the teams, promising to give him a load of hay if he would do so. Crosby was not to buy for himself, but for Mr. Lynds (Vansickle's agent)—the understanding was that he (Crosby) was not to bid against Mr. Lynds. Mr. Crosby did attend the sale, and bought two teams and some other property. Vansickle gave him a bill of sale, and Crosby gave one to Mr. Lynds. Vansickle sent Crosby the promised load of hay.

Before going to Mr. Crosby, Mr. Vansickle went to Mr. Derby and asked him to bid in the stock. Mr. Derby declined, and referred Vansickle to Crosby. Mr. Derby testified that he judged from what Vansickle said, that the stock was to be purchased for Elder—that Vansickle wanted to assist Elder.

Now, on his first examination, Vansickle stated that Crosby

bought one team at the sale; that he did not know that Crosby bid it in for some one else; that he had no understanding with Crosby, and never gave him a cent.

When recalled, subsequent to the witnesses Crosby and Derby, he admitted the conversation with Crosby and the sending of the load of hay.

Aside from every other consideration, little regard can be given to the testimony of a witness who swears thus recklessly.

Elder's testimony is still worse: he stated that he never offered to give either Mr. Bruso or Mr. Barton a note for more than was due them.

These gentlemen both testified that he did offer to do so. Barton says Elder owed him two thousand dollars, and offered to give him a note for four thousand dollars.

Elder states that about the 7th or 8th of October, 1869, he gave John Frazier a note for six thousand dollars, although he owed him only about one thousand four hundred dollars. He also admitted that on the 29th of October he sold a team (nine mules and one horse) to Frazier, who was to give it back when he (Elder) got "fixed;" that this was done with a view to breaking up.

The whole testimony compels me to the following conclusions of fact:

That the notes 1 and 2 are fraudulent and void as to the other creditors of the estate.

That these two notes were made for the purpose of fraudulently enlarging the claim of Vansickle against the estate.

That the transactions of October 19, and up to and including October 29, were done with a view to Elder's bankruptcy, and for the purpose of giving Vansickle an undue advantage, under the Bankrupt Act, over the other creditors of Elder.

That before and since the filing of Elder's petition, and since Vansickle has been acting as assignee, there has been an understanding between Vansickle and Elder, having, for its object, their mutual benefit at the expense of the other creditors of the estate.

It only remains to determine what effect the fraudulent and

illegal portion of this claim has upon that part of it which is admitted to be just if separated from the other.

From the language of Sections 8, 22, and 24 of the act, and Forms 66 and 68, it is evident that, in a proper case, a claim may be allowed in part, or allowed or disallowed as a whole. What the action of the court will be, must depend, in each case, upon the circumstances of that particular case.

The object of the Bankrupt Law is to enable the honest debtor to obtain, by a full surrender of his property, a discharge from his debts, and to distribute to the honest creditors, *pro rata*, the property of the debtor. The law is full of provisions to prevent not only actual frauds, but any act which tends to defeat its object.

The 39th Section provides that any creditor receiving any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits from the bankrupt, he intending to give a preference, such creditor, at the time, having reasonable cause to believe the debtor insolvent, shall not be allowed to prove his debt in bankruptcy.

Here a creditor is debarred from proving his debts if he has accepted part payment, however just his claim, or however free he might be of any actually dishonest motive in accepting this preference.

Can this court say that the creditor who deliberately commits a fraud upon the act and the other creditors by other means, shall receive at its hands better treatment than this creditor who has accepted a preference from the debtor of a partial payment of a just debt?

The conduct of Vansickle is fully within the spirit and intention of the prohibition and penalty of this section, if not strictly within its letter, and a thing clearly within the intention is within the law, though not within the letter.

Every party to proceedings under the Bankrupt Law must be held to the utmost good faith; and he who attempts a fraud cannot, if discovered, complain when made to abide by the legal consequences of his act.

If the strict rules of other courts in adjusting the priorities of

creditors are applied, this claim must fall as a whole. If a party having several just claims includes in his judgment one that is unjust, or that is not yet due, or more interest than is due, his whole judgment, so far as it is a lien having priority over other creditors, will be postponed until junior creditors are paid. *Pierce* v. *Partridge*, 3 Met., 44.

Where one had obtained a judgment, and included in it the amount of one note known to be fraudulent, it was argued that the judgment ought to stand for so much as was just, but the court said: The argument amounts to this—that a man having a just claim to a small sum, who should fraudulently bring forward claims to a much larger amount not due, and who should be detected, should be placed in as good condition, at least, as if he had not mixed the good and bad together. We think the law is directly the reverse, and that the fraud corrupts and destroys the whole. *Fairfield* v. *Baldwin*, 12 Pick., 338. This language is cited with approval of the Supreme Court of California, in a case where a party had taken judgment on five notes, one which was not due. *Taaffe* v. *Johnson*, 7 Cal., 352. To permit Vansickle to now separate the good portion of his claim from the bad, and thus be put in as good condition as if he had attempted no wrong, would be contrary to well-settled principles of law, and to the plain requirements of the Bankrupt Act.

The order of the court, which the clerk will enter, is as follows:

Upon the evidence submitted to the court upon the claim of Henry Vansickle against the said estate of Geo. Elder, and upon hearing counsel thereon, it is ordered that the said claim be disallowed and expunged from the list of claims upon the assignees' record in said cause.

It is further ordered, that the said Henry Vansickle do pay the costs of this proceeding.

UNITED STATES DISTRICT COURT—E. D. PENNSYLVANIA.

Proper notice must be given by the assignee to creditors, and the Register should see that this duty is performed. The non-performance of it renders the bankrupt liable to lose his right to a discharge.

In re MICHAEL N. BUSHEY.

BY the court. CADWALADER, J.—31st March, 1870.

The clerk has shown to me a letter from the assignee, which may be filed among the papers of the case. The Court of Bankruptcy, for all purposes of the auditing, settlement, and adjournment of assignee's accounts, under the 27th and 28th Sections of the Act of Congress, and of distribution under them, is held provisionally by the Register, whose acts are, of course, subject to exception. Full opportunity for exception at the public meeting, or an adjourned session of such meeting, should be afforded to all parties interested. The assignee should see that proper special notice be given to creditors who have, and to those that may not have previously proved their debts; and the Register should see that this moral and legal duty of the assignee has not been neglected. A bankrupt who allows omissions to occur in these respects may, through neglect of his duty to creditors, lose the right to a discharge. After all due precautions have been thus adopted, exceptions must be taken before the Register, and certified by him to the court with his report.

Exceptions, unless upon special cause shown, are not afterwards received by the court. If no exception is certified, the acts of the Register are, in themselves, acts of the court, without any formal judgment of confirmation. Such a judgment could never be advisedly made here.

In all cases, under this head, the Register will so report as to show particularly how notices and opportunity for exception have been given.

UNITED STATES SUPREME COURT—TERRITORY OF UTAH.

Where a sum of money, and sundry articles of jewelry in the possession of one of the bankrupts were refused delivery to the marshal upon his making demand for same, and a motion is made for the examination of said bankrupt, to show what he had done with said property. The bankrupt's plea was, that reasonable time had not been allowed him.

Held, 1. The defendant is liable to examination after due service of copies of the petition, and the orders in the case, although final adjudication had not been had.

2. The defendant being before the court on his own behalf, he was *at that time* liable to examination without other notice, his plea of want of reasonable notice cannot be entertained.

3. The defendant cannot claim the protection of the court, on the ground that if he answers questions as to what he had done with said personal property he will criminate himself, etc.

In re J. E. Bromley & Co.

On motion of petitioners for the examination of Richard A. Keyes, one of the said bankrupts.

OPINION OF JUSTICE C. M. HAWLEY.

On the application of Richard A. Keyes, one of the alleged bankrupts, to be allowed to give bond, etc.,

A motion was made in behalf of the petitioner for the examination of the said Keyes, upon the question what he had done with the sum of five hundred dollars in money, and a few articles of certain diamond jewelry mentioned in the supplemental petition, charged to be of the value of about two thousand dollars.

This application of the petitioners is based upon the return of the marshal indorsed upon the original writ, showing due service of the same, and of copies of the original order of the court and injunction upon the said Keyes, and that the marshal had made a demand upon him in pursuance of said order for all moneys, property, and effects of the said alleged bankrupts; and such property they refused to deliver to him.

In examining the law controlling this motion, it must be borne in mind that the primary and chief design of the Bankrupt Act is to distribute the bankrupt's estate under the provisions of the act, and also that the primary and chief object of

the arrest of the bankrupt, and of taking provisional possession of his estate on filing of the petition, etc., before final adjudication of the bankruptcy is had, is for the purpose of securing such distribution, and as a means thereto, to enable the court to enforce its orders and decrees.

The subjection of the bankrupt and of his property to the court is not for the purpose of punishment in any sense, but to enable the court to enforce such distribution, and as a matter of necessity, the law makes the defendant from and after the first preliminary and *ex parte* adjudication upon the petition, and proof therewith filed, subject to any and all orders that may be deemed necessary under the act to secure the creditors such distribution.

By Section 26 of the Bankrupt Act of 1867, the court may, on application of the assignee in bankruptcy or of any creditor, or without any application, *at all times* require the bankrupt, upon reasonable notice, *to attend*, and to submit to an examination on oath upon *all matters* relating *to the disposal or condition of his property, etc.*, and all matters concerning his property and estate, etc.

And by Section 38, such evidence or examination in any proceedings under the act, may be taken before the court or Register in bankruptcy, *viva voce*, or in writing before a commissioner of the Circuit Court, or by affidavit, or on commission; and the court may direct a reference to a Register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony, in the same manner as in suits of equity in the Circuit Court.

It is plainly seen that by the terms of these two sections of the act, this application of the petitioners ought to be granted. There is not ground even for a doubt of their absolute right to such examination, when, as in the case at bar, there is shown a sufficient foundation for the application. By the provisions of the 40th Section of the act, before service of the original process or of publication, the court, or any judge thereof, may order, in addition to the original process, an injunction to

issue to restrain the debtor and others from disposing of his property and effects, etc., the arrest of the alleged bankrupt, and the provisional possession of his estate. But, unless such service or publication is had, no further proceedings, unless the debtor appear and consent thereto, shall be had, until proof shall have been given to the satisfaction of the court, of such service or publication, etc.

It appearing that due service had been made upon the said alleged bankrupt, in conformity to this section, the door was thrown open for such other proceedings as justice and equity and the act not only permit but require.

Among such proceedings is the examination of the bankrupt at all times, but my brother justice, Strickland, suggests that such examination cannot be ordered or indulged in by the court until after the debtors are declared to be adjudged to be bankrupts. In support of this proposition, he says that the term debtor is used in the Bankrupt Act when applied to a defendant in an involuntary proceeding, before such adjudication, and the term bankrupt is used after such defendant has been declared or adjudged to be a bankrupt by the court. If such are the facts of the case, or of the law, then there may be some force in the suggestions; yet it can but be perceived that if such a construction should prevail, the evident intent and purpose of the act would be subject to defeat at the commencement of bankrupt proceedings, and before such adjudication could take place. While it is true that for some purposes this distinction is made or observed in terms by the act, yet it is equally true that for other purposes these two terms are used as synonymous terms. In Section 21, it is provided that no creditor, whose debt is provable under this act, shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the *bankrupt, until the question of the debtor's* discharge shall have been determined. Section 26 (last clause) provides that, no bankrupt shall be liable to arrest during the pendency of the bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge or bankruptcy would not release him.

Can it be justly claimed that this provision applies to, and was designed to protect involuntary subjects after they had been formally declared upon such adjudication bankrupts? It must be confessed that such a construction would manifestly be a narrow one, and in utter violation of the spirit and purposes of the act. No such construction, to my knowledge, was ever presumed to have been given to it. But it will be observed that the term is applied to the debtor from and after the time of the commencement of the proceedings in bankruptcy.

By a clause in the 37th Section, it is plain that the term "debtor," when referred to in the act, after the commencement of proceedings in bankruptcy against such debtor, subjects such debtor, when good cause is shown, to an examination before adjudication in his case; the clause mentioned is as follows: "And all the provisions of this act, which apply to the debtor, or set forth his duties in regard to furnishing schedules or inventories, executing papers, *submitting* to examinations, disclosing, making over, secreting, concealing, conveying, etc., shall apply with like effect to the officers of corporations," etc. Here, by express terms, the debtor, by that term, is referred to as being subject to examination; and if he is called a bankrupt only after being declared such, *which he is not*, and a debtor before such adjudication, then manifestly he is made subject to examination before adjudication, for he is made so subject to the term debtor.

In connection with the said clause of the 26th Section above quoted, to wit: that "no bankrupt shall be liable to arrest during the pendency af the proceedings in bankruptcy," etc., has direct relation to the 38th Section, which provides, "That a filing of a petition for adjudication in bankruptcy, either by a debtor or creditor, upon which an order may be issued by the court, or by a Register, in the manner provided in Section 4, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act."

By a clause in the 42d Section, the debtor, by the terms of the act, is called a bankrupt before he has been declared such by final adjudication. It is as follows:

"The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days, not exceeding five days after the date of the order, or notice thereof, as shall by the order be prescribed, to make and deliver and transmit by mail, post-paid, by the messenger, a schedule of the creditors and an inventory of his estate, in the form and verified in the manner required of a petitioning debtor by Section 13, * * * and if the bankrupt is absent or cannot be found, such schedules and inventory shall be prepared by the messenger and the assignee, from the best information they can obtain," etc.

In this clause the debtor, before adjudication, is by the act in terms called a bankrupt.

The language of the 44th Section of the act is to the same purport, as follows: "That from and after the passage of this act, if any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy, secrete or conceal any property belonging to his estate, or part with, conceal, etc., he shall be deemed guilty of misdemeanor, and upon conviction shall be punished," etc.

The 4th Rule, which by the act is made part of the act itself, fully justifies the views we have above expressed. It reads as follows:

"Upon the filing of a petition in a case of voluntary bankruptcy, or as soon *as any adjudication* of bankruptcy is made upon a petition filed in case of involuntary bankruptcy, the petition shall be referred to one of the Registers in such manner as the District Court shall direct, and the petitioner shall furnish the Register with a copy of the papers in the case, and thereafter all the proceedings required by the act shall be had before him, except such as are required by the act to be had in the District Court, or by special order of the District Judge, unless some other Register is directed to act in the case.

"The order designating the Register to act upon any petition shall name a day upon which the bankrupt shall attend before the Register, from which date he shall be subject to the orders of the court in all matters relating to his bankruptcy,

and may receive from the Register protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall be sent forthwith by mail to the Register, or delivered to him personally by the clerk or other officer of the court."

By the language of the said 42d Section and of the 4th Rule, all doubt upon this question is dissolved, and all ambiguity cleared away. Mark the language of this 42d Section:

"The order of adjudication of bankruptcy shall require the bankrupt (not debtor) forthwith, or within such number of days not exceeding five days after the date of the order or notice thereof, to make and deliver to the messenger a schedule of the creditors and an inventory of his effects, etc., and if the *bankrupt* (not debtor) is absent or cannot be found, such schedule and inventory shall be prepared by the messenger," etc.

Here the debtor, from and after the filing of the petition, or from and after the commencement of the proceedings in bankruptcy against him, by the act, is denominated or called a bankrupt, and for the purposes of the proceedings he is not only called such by the terms of the act, but he is treated as such by the proceedings themselves; and especially is he treated as such in cases of involuntary bankruptcy proceedings.

This is manifest by the proceedings themselves, for when a petition is filed by a creditor against a debtor, and it is presented to the court or judge thereof for an order, or for all the orders named in the 40th Section of the act, in pursuance to the prayer of the petition, and such order or orders are made, there has been an adjudication had in the case—not a final one, it is true, but such an adjudication as warrants or authorizes the issue of the said orders.

Mark the language of said 4th Rule:

"Upon the filing of a petition in case of bankruptcy, or as soon as any adjudication of bankruptcy is made upon a peti-

tion filed in case of involuntary bankruptcy, the petition shall be referred to one of the Registers, etc., from which date he, the bankrupt, shall be subject to the orders of the court in all matters relating to his bankruptcy."

If such is not the meaning of the act taken in connection with this Rule, of what force or use would any of the said orders mentioned in the 40th Section be? They are permitted by the act to be made, and to be of force when made, from the facts that the matter set up in the petition against the debtor is adjudged to be sufficient under the act for making and enforcing such orders.

And from such time, and from such adjudication in contemplation of the act, and for the purposes of the proceedings, he is denominated and called a bankrupt, and is made, in the language of the said Rule, subject to the orders of the court in all matters relating to his bankruptcy. If such is not the meaning and intent of the act, then the court would be utterly powerless to enforce the said orders named in the 40th Section, until final adjudication upon the question of actual bankruptcy of such defendant, and thus the purpose or object of the act in its provisions of exact equity required of the court in executing the law would be defeated. This conclusion seems so unquestionable that, under ordinary circumstances, I should feel I was imposing upon reason and the forbearance of my associates to dwell at such length upon the question, and my only apology is my high respect for my brother and those members of the bar who seem to entertain a counter opinion.

The next question raised is that the defendant Keyes has not had reasonable time after the notice of the motion of his examination. He is most certainly entitled to reasonable time; but such time, or the length of such time, always depends upon circumstances and facts surrounding the defendant. The distance he is from the court, or the place of his examination, and also upon what, if any, particular facts he is to be examined.

If the defendant is a merchant, and has been doing a large and complicated business, and he is notified that his examin-

ation is to cover his entire business operations, a reasonable time would manifestly be much longer than in a case where the notice of examination was in regard to a few items of his property, as in this case, pertaining to his own person, such as watch, ring, and money in his pocket when service was made upon him.

It will be remembered that the defendant Keyes, at the time this motion was made, was, on his own motion, before the court, for the purpose of releasing himself from custody by giving requisite bail; having presented himself for this purpose, and while in court, the petitioners ask the court for leave to examine him in court as to what he had done with five hundred dollars in money, his watch, and one or more diamond rings which he was alleged to have had upon his person, and which he was alleged to have refused to surrender to the marshal.

Under such circumstances, was the asking of such an examination placing the defendant under any hardships which an honest man would not most willingly submit to? Do the circumstances warrant him in asking for a postponement of such an examination for the want of a reasonable notice? Is he, under the law of notice, under such circumstances entitled to a postponement of such an examination? A reasonable notice is such time as will enable him to reach and appear before the court with such knowledge as may be under his control upon the matters of the investigation or information asked for.

The information asked for is in his possession, and to answer them requires no pleading. His answers to questions are to be made orally to the court, or to a duly appointed officer of the court. They call for no exercise of skill, but only the capacity and the disposition, under his solemn oath, to answer according to the simple truth. A child can do this without hardship, and without requiring more time than the mere announcement of the question.

To conclude that the defendant required one, two, or three days to study under the tutelage of counsel, would seem to reflect more strongly upon the uprightness of his purposes than upon his capacity or inability to answer such questions.

It has been said that the petition charges Mr. Keyes with a fraud, and therefore he ought not and cannot, even under the Bankrupt Act, be required to answer questions in support of such allegations. While it is true that the law, as a general rule, protects a criminal to an extent that it will not require him to criminate himself, yet the Bankrupt Act, and even equity, takes this protection from the bankrupt in many particulars and under many circumstances, and compels the bankrupt to answer or testify against himself, though he may thereby criminate himself, when he has committed, or is charged with having committed, a fraud under the Bankrupt Act.

The power given to the court to examine the bankrupt at all times upon reasonable notice, is a fundamental as well as an important element in the administration of the Bankrupt Law. Without such power, proceedings in bankruptcy, in many cases, would be ineffectual, thereby defeating the equity designed by the enactment.

By the act, the bankrupt may be examined upon oath, upon all matters relating to his trade and dealings with others, and his accounts concerning the same; upon all matters relating to debts due or claimed from him, and as to all matters concerning his property and estate, and the due settlement thereof according to law. See Section 26.

The language of Section 26 is very comprehensive, and embodies in fact the provisions of the act of 1841, and also those of the 12th and 13th Vict., C. 106, Section 117. While it is true from the necessity of the case that difficult questions are liable to arise upon the examinations of all bankrupts, yet it is also true that the bankrupt cannot cover up his fraud behind his shield, that if he answers he will criminate himself by proving up his fraud in testifying as to the distribution of his property. Though such examination may expose him to penalties for fraudulent concealment or fraudulent disposition of his property, he is left to the judgment of the law, notwithstanding it may be possible, nay, probable, that he may be protected from disclosing some distinct criminal act; but even in such case he cannot be protected in refusing to discover all his estate and

effects and the full particulars relating to them, though thereby he may show that he has been guilty of fraud or of fraudulent concealment, or that he owns property that he has illegally obtained, and will render him liable to penalties.

It has been held that a bankrupt is bound to answer questions relating to particular property, though at the time an indictment was pending against him for the concealment of such property. It has been held also that a bankrupt was compelled to answer touching his estate and effects, although such answer or answers might tend to convict him of perjury committed by him on a former occasion, and also be evidence against him that he had incurred penalties by concealing his effects. And it has also been held that he cannot refuse to answer questions tending to show that he has committed the act of bankruptcy charged in the petition. See James' Bankruptcy, 108, and the cases by him cited. The American as well as English authorities are full of cases and precedents fully sustaining the positions and principles we have taken and laid down and attempted to make plain.

We must therefore hold in the case at bar,

First. That the defendant, Keyes, is liable to examination after due service of copies of the petition and of the orders made in the case upon him, when *prima facie* he is shown to have property which he has refused to surrender to the marshal after demand was made upon him for the same, although at the time of such demand the final adjudication upon the question of the actual bankruptcy of the defendants had not been had.

Second. That the defendant, Keyes, being before the court on his own behalf, he was at that time liable to the examination asked for by the petitioners without other notice than that given by the motion itself made in his presence, and without any postponement of the examination on the ground that such notice in this case was not a reasonable notice.

Third. The said defendant, Keyes, cannot claim the protection of the court, on the ground that if he answers questions as to what he has done with the five hundred dollars in money, his

watch, and his diamond rings, etc., which he is charged to have withheld from the marshal, he will criminate himself; or that such answers will tend to prove him guilty of a fraudulent concealment or disposition of his property.

C. M. HAWLEY,
Associate Justice.

UNITED STATES CIRCUIT COURT—W. D. OF MICHIGAN.

Where judgment had been rendered for a debt by a Justice of the Peace, previous to the adjudication of bankruptcy, and had not been satisfied,

Q.—Was the debt, as it stood at the time of the adjudication, provable or not?

***Held*, the debt is not so merged in the judgment as to deprive the creditor of the right to prove it.**

In re JONATHAN W. VICKERY.

I, J. DAVIDSON BURNS, one of the Registers of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, Latham Hull, a judgment creditor of the said bankrupt, applied for leave to prove his judgment under the proceedings in bankruptcy, and produced a transcript from the docket of a Justice of the Peace, showing that on the 31st day of December, A.D. 1869, he, the said Hull, commenced suit against the said bankrupt, before the said Justice. Summons was issued, returnable on the 6th day of January, 1870; and on the said last-mentioned day, judgment was rendered in favor of the said Hull, and against the said bankrupt, for damages and costs of suit.

It appears that on the 3d day of January, 1870, the said Vickery filed his petition in said District Court for adjudication of bankruptcy, and that on the 5th day of January he was adjudged a bankrupt.

The said suit of the said judgment creditor having been commenced before the said Vickery was so adjudged bankrupt, but judgment not rendered until after that event, I declined to take proof of the judgment for either damages or costs, on the

ground that it was not provable—the judgment itself not being an existing debt at the time of the adjudication of bankruptcy. The question then arose whether the debt, as it stood at the time of the said adjudication, was or was not provable.

It has been held by the United States District Court for the district of Connecticut, *in re* Williams, 2 B. R., 79, that neither the judgment nor the debt are provable, where, after the commencement of the proceedings in bankruptcy, the judgment has been rendered upon a debt which has existed before that time; that the debt was merged in the judgment and extinguished by it, and that the judgment, which had no existence at the date of the adjudication of bankruptcy, constitutes a new debt, which takes its date from the time of recovery.

In reference to the debt, directly the contrary has been held by the District Court for the Southern District of New York, *in re* Brown, 3 N. B. R., it being decided in that case that the debt, but not the judgment, was provable.

While I am of the opinion that the true and reasonable construction of the law is contained in the decision last named, and that the claim of the said Hull, as it existed upon the day the said Vickery was adjudged a bankrupt, is provable, yet in view of the fact that two such eminent jurists as Judges Shipman and Blatchford, differ so widely in passing judgment upon the question, I declined to admit proof of the said debt until the matter has been certified to the judge for his opinion thereon. And the said judgment creditor and the assignee of the said bankrupt requested that the same should be so certified to the judge for such opinion.

J. Davidson Burns,
Register.

Withey, J.—I dissent entirely from the rule laid down, *in re* Williams, 2 N. B. R., 229, and fully concur in the decision *in re* Brown, 3 N. B. R., 000.

The debt in the case reported by Register Burns existed at the time of the adjudication of bankruptcy, and if it has never been paid or satisfied may be proved in bankruptcy.

The fact that judgment has been rendered for the debt, is neither payment or satisfaction thereof in any sense which prevents proof of the debt in bankruptcy.

It is not the judgment, but the debt as it existed on the 5th day of January, the day of the adjudication, that is provable.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Is a debt which exists at the time of the actual adjudication of bankruptcy, although not existing at the time of filing the petition for adjudication, provable against the bankrupt's estate?

Is a simple contract debt existing at and before the filing of the petition for adjudication of bankruptcy, on which a judgment has been rendered *after* such filing, the same debt within the meaning of the several provisions of the Bankrupt Act, relating to the proof of claims against the estates of bankrupts?

***Held*, it is the intention of the act that such debts, and such only, as existed at the time of the filing the petition for adjudication of bankruptcy are provable against the bankrupt's estate.**

In re FRANCIS CRAWFORD.

AT Detroit, in said district, on the 28th April, 1870. Before Mr. Hovey K. Clarke, Register.

I, the above named Register, do hereby certify that in the course of proceedings before me at this date, in the above bankruptcy, Milton H. Butler offered his deposition to prove his claim against said bankrupt's estate. The deposition shows that the claim originated in the indorsement to the claimant, by said bankrupt, of a promissory note which became due on the 23d day of April, 1869; that the bankrupt was duly charged by notice, and that the claimant commenced a suit in the Circuit Court for the county of Wayne on the 3d day of May, and on the 15th day of September following recovered a judgment against said bankrupt on said liability. The petition for the adjudication of bankruptcy in this case was filed on the 25th day of June, 1869, after the commencement of said suit, and before the rendition of the judgment. The order of adjudication of bankruptcy was not actually entered until the 6th day of April, 1870. The judgment under which the claimant now

claims not having been rendered "at or before the filing of the petition" (see Form No. 22, prescribed by the general orders of the Supreme Court), I declined to accept and file proof thereof, on the ground that the debt was not provable under the Bankrupt Act. The said claimant desiring to take the opinion of the District Judge upon the points presented by his offer to prove his claim, I respectively submit a certificate to be signed by the judge, if he approve thereof, as provided by the 6th Section of the Bankrupt Act, together with my opinion upon the questions presented. The questions are:

First. Is a debt which exists at the time of the actual adjudication of bankruptcy, although not existing at the time of filing the petition for adjudication, provable against the bankrupt's estate?

Second. Is a simple contract debt existing at and before the filing of the petition for adjudication of bankruptcy, on which a judgment has been rendered after such filing, the same debt within the meaning of the several provisions of the Bankrupt Act relating to the proof of claims against the estates of bankrupts?

OPINION OF THE REGISTER.

Section 19 declares what debts "may be proved against the estate of the bankrupt." It specifies several classes of debts, in four of which, *time* becomes a material question. The words employed in the act to fix the time, which, in the specified cases, becomes material, are—"the time of the adjudication of the bankruptcy"—"after the adjudication of bankruptcy"—"after the proceedings in bankruptcy were commenced," and "up to the time of the bankruptcy." What time is intended by the "commencement of proceedings" is not left to construction. It is expressly declared by Section 38 to be "filing of a petition for adjudication in bankruptcy, either by a debtor on his own behalf, or by any creditor against a debtor." Of course, the *order* of adjudication must, in respect to time, be after the filing of the petition praying for such adjudication, and practically, and especially in involuntary cases, the order

may not be made for weeks or months after the commencement of the proceedings. This sometimes occurs also in voluntary cases, when delays arise from the necessity of amending schedules, or from other causes, and it becomes a very serious question, whether it will be consistent with other provisions of the act, to hold that a person for whose adjudication as a bankrupt a petition has been filed, may continue down to the time when the order of adjudication was entered to create debts, which may be proved against his estate. If so, a very striking incongruity results. By Section 14 it is enacted, that the instrument of assignment, by which the assignee takes the title to the property of the bankrupt, "shall relate back to the commencement of said proceedings in bankruptcy"—which Section 38 declares to be the time of filing the petition, and by the form of the deed, prescribed by the general orders of the Supreme Court, Form No. 18, it is made necessary to specify the particular day with reference to which the conveyance is to take effect. Subsequently acquired property is not within the terms of the deed; and it is supposed to be well settled by repeated adjudications, that it does not pass. To hold that a subsequently created debt—that is, subsequently to the filing of the petition—can be proved against the bankrupt's estate, while property subsequently acquired cannot be reckoned as a part of that estate, would seem to be what the law never could have intended. The uses, not only inequitable in effect, but fraudulent in purpose—which such a construction of the law might serve—are too obvious to require illustration.

Other parts of the Bankrupt Act, moreover, conflict with the theory that a debt may be proved that did not exist at the time of the commencement of the proceedings. Section 32 prescribes in terms the form of the discharge which shall be granted to the bankrupt, namely, that he shall "be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the —— day of ———, on which day, *the petition for adjudication was filed by or against him.*" It seems necessary, in view of such express terms as these in the 32d Section, to hold that the

words, "time of adjudication," and "time of the bankruptcy," in the 19th Section, must be construed to be equivalent to "the commencement of proceedings"—"at the time of filing the petition;" and a debt which did not exist then cannot be proved. These views, I think, are fully sustained by Patterson's case, 1 N. B. R., 125, decided by Judge Blatchford, in the Southern District of New York.

The remaining question is, whether a judgment rendered against the bankrupt in favor of the claimant, on the 15th day of September, 1869, was either—1st, a debt due and payable on the 25th day of June, 1869, the day when the petition was filed; or 2d, whether it was a debt then existing, but not payable until a future day. It must be one or the other to be provable under Section 19.

The claimant insists that the deposition he offers, shows his debt to belong to the first of these classes; that at the time of filing the petition, the bankrupt was liable to him as the indorser of a promissory note which becomes due April 23; the indorser was duly charged by notice of non-payment—that on the 3d of May, he commenced a suit against the bankrupt, in which he obtained a judgment against him on the 15th day of September. The records and files of this case show that the petition in bankruptcy was filed after the suit was commenced, and before the judgment was obtained. The claimant, to sustain his right to prove his debt, is obliged to insist that the judgment and the note on which the judgment was rendered, are evidences at different stages of its history of the same debt. If he be correct in this, his right to prove his debt is clear.

But this position of the claimant is opposed by the principle, that a judgment extinguishes the liability or contract on which it is rendered. This principle is abundantly supported by authority. Judge Campbell, in *Bonesteel* v. *Tood*, 9 Mich., p. 375, referring to a cause where highly equitable considerations existed against his application (namely, where a judgment had been obtained against one only of two joint debtors), says, "this decision was in accordance with an unbroken line of decisions of the common law, whereby a party electing to take a

higher security, and thereby *put an end to the liability* of one debtor upon the contract, deprived himself of any further claim against the other by *destroying* the only joint demand." That is, the judgment "puts an end to," "destroys" all previous liability. If so, then, in this case, the judgment of September 15, *extinguished* the liability created by the indorsement of the note of January 20, and in a subsequent case in the Supreme Court of this State, where the opinion was delivered by Judge Christiancy, *Town* v. *Smith*, 14 Mich., p. 352, when the equities of the plaintiff and the moral obligations of the defendant both urged a departure from the above principle, the court saw "danger of doing more injury by unsettling the law in other cases than by adhering to it in that. It is not easy to measure the possible mischief of disturbing well-settled principles." In the *Williams* case, 2 N. B. R., 229, in the District Court for the district of Connecticut, where the question presented was the same as that presented here—whether a debt, on which a judgment had been rendered since the adjudication was provable against the bankrupt's estate: "On this point," Judge Shipman says, "the authorities are numerous and decisive, a debt on which a judgment of law is founded, is merged in that judgment, and *extinguished* by it. The judgment constitutes *a new debt from the time of its recovery*."

There is, however, a still later case, that of *Brown*, 3 N. B. R., decided by Judge Blatchford in the Southern District of New York, expressly dissenting from Judge Shipman's views in the *Williams* case. Between these distinguished authorities I am compelled to choose. Judge Shipman's decision rests upon and is "in accordance with an unbroken line of decisions of the common law." The ground of Judge Blatchford's decision is not so clear. He says, "If the debt in this case existed at the time of the adjudication it is provable, although the judgment is not provable as such, because it did not then exist." True it did so exist at that time of the adjudication, and under the authority of Judge Shipman and the cases cited by him, it had been extinguished, and a new debt created which did not then exist. Judge Blatchford concedes the correctness of

this principle "in ordinary cases," but it has "no applicability," he says, "under the Bankrupt Law." I have looked into his opinion with some care, to ascertain on what grounds he affirms inapplicability of the principle in bankruptcy practice, conceded to be sound in ordinary cases. These grounds seem to be—1st, Repugnance to Section 21; and 2d, Hardship to creditors who may not know of the proceedings. I think the supposed repugnancy arises from a misapprehension of Section 21; and the hardship is the other way. Section 21 declares that no creditor whose debt is provable under the act, shall be allowed to prosecute his suit to final judgment. What was the object of this prohibition? I suppose it was to prevent a creditor from obtaining, under the well-settled principles already referred to, a *new debt* which would not be discharged by the final certificate in that case—for that certificate, as has been already mentioned, discharges only such debts as existed on the day of filing the petition. It is true that permission may be obtained, for a single specified purpose, to proceed to judgment, and doubtless in such a case the common-law principle as to the effect of the judgment would be modified—for it would be in the nature of an inquest out of the Bankrupt Court to determine a disputed point, and is allowed only for that purpose; and not then, unless leave could be specially granted, and the order granting leave could of course control its effect. It would seem that it was the common-law effect of a judgment, namely, to create a new debt, which was the occasion of that provision in Section 21, which forbids a creditor whose debt is provable to proceed to final judgment. So far then from Section 21 being rended nugatory by the continued force of the common-law principle, if a party be not allowed to proceed at will to judgment, the regarding of the principle as having "no applicability under the Bankrupt Act," takes away the most effective motive for obedience to the section in question. So far from the section being rendered nugatory by giving effect to the common-law principle, it is strongly supported by it, and is in the strictest harmony with it.

The other ground of the inapplicability of the common-law doctrine to cases under the Bankrupt Act, namely, that of hardship to creditors, seems to be equally unfounded. The hardship is thus stated: "A creditor might go on in ignorance of the adjudication, and obtain a judgment for his debt, and find himself deprived of the power of proving either his debt, or his judgment." The cases of such ignorance will probably be very rare, and if they were as remediless as seems to be supposed, it may well be doubted whether it would be wise to give such a construction to the law as will afford protection to the ignorant few, at the same time that it relieves all others from the consequences of a deliberate violation of the law. But there is, indeed, no hardship. A creditor having obtained a judgment, either in ignorance of the proceedings in bankruptcy, or shrewdly aiming to secure some advantage to himself by obtaining a judgment on his claim, notwithstanding the law forbidding it, can always restore himself to the position he was in before he took his judgment, by moving in the court where it was obtained that it be vacated. Such an order, for such a reason as he would offer, would never be refused. But to allow him to retain his judgment and to prove it, or the debt on which it was founded, against the bankrupt's estate, *exposes the bankrupt to the hardship* of being compelled, in case of his discharge, to move, in the court where the judgment was rendered, for a perpetual stay of execution, on grounds which the provisions of the Bankrupt Act would probably sustain. But why should the *onus* of the preparation of the case, on which to found such a motion, and the expense of the employment of counsel to make it, be thrown on the bankrupt who has himself faithfully conformed to the Bankrupt Act, in order to avoid the consequences to himself which have followed the violation of the Bankrupt Act by his creditors? It is to be remembered also that the motion of the bankrupt for a stay of execution would be addressed to the *discretion* of the court, which would add another element of uncertainty as to his rights, against which he has a right to claim the protection which the Bankrupt Court is fully able to afford, but which it

cannot do if it allow a judgment rendered since the proceedings were commenced to be proved against the bankrupt's estate.

It is to be observed also that the only effect of refusing to allow the judgment to be proved will be by compelling the creditor to seek the vacation of his judgment; and then, to prove his debt as it exists at the time of filing the petition will be to lose the costs which accrued in obtaining his judgment. In the Brown case, decided by Judge Blatchford, above referred to, the creditor expressly waived the claim for costs, and the court held that the debt as it stood before adjudication, only, could be proved. And it would seem clearly inequitable to allow costs which have been made by one creditor in proceedings continued to judgment in violation of the Bankrupt Act, to be paid out of a fund in which all other creditors are interested; and the recovery of these costs is probably a very considerable motive in this particular case for insisting on proving the judgment as such. It is apparent that there is nothing in this case, nor in any case similar in its facts, to call for the exercise of such general equity powers as are sometimes invoked to prevent a technical merger from working injustice. Justice to all the creditors requires that costs which have been made by one or more, should not be paid out of the fund, at the expense of those who have more scrupulously regarded the Bankrupt Act. I am obliged to say, therefore, that I can discover no reason, resting either on legal principles or any equitable considerations, for the allowance of proof of the claim offered.

All which is respectfully submitted to the decision of the District Judge.

HOVEY K. CLARKE,
Register.

ORDER OF THE COURT.

Milton H. Butler held the bankrupt's indorsement upon which his liability had become fixed, and a suit in a court of law had been commenced, and was pending at the time the petition for adjudication of bankruptcy was filed. Upwards of

eight months intervened between the time of filing the petition and the adjudication, and in the meantime Butler had gone on and taken judgment. He now asks to have his judgment proven against the bankrupt's estate, and makes a full showing of all the facts in relation to his claim as above stated. Two objections are urged to his application:

First. That the judgment did not exist at the time the petition for adjudication of bankruptcy was filed.

Second. That the original claim is merged in the judgment, and therefore it cannot be proved against the bankrupt's estate.

The Register, Mr. H. K. Clarke, after reciting the above facts, certifies that, in his opinion, both objections ought to be sustained, and the debt rejected.

Held, as to the first objection:

From a comparison of different provisions of the Bankrupt Act, I am satisfied that it is the intention of the act that such debts, and such only, as existed at the time of the filing of the petition for adjudication of bankruptcy, are provable against the bankrupt's estate. Any other construction would lead to endless complications and difficulty. The language of Section 19, "That all debts due and payable at the time of the adjudication of bankruptcy," may be proved, etc., has reference to the condition of the debt as to its maturity or time of payment. This construction is borne out by the very next sentence, which is as follows: "And all debts then existing, but not payable until a future day," etc. This construction makes the provisions of the act harmonious. *In re* Patterson, 1 N. B. R. 125.

I, therefore, fully concur with the Register in his opinion that a debt not existing at the time of filing the petition for adjudication in bankruptcy, is not provable against the bankrupt's estate.

I also fully concur with the Register in his opinion that the debt upon which a judgment is founded is merged in the judgment, and that thereafter all remedies and proceedings for the collection of the debt must be based upon the judgment.

These propositions are too well settled to admit of dispute, or need any argument to support them. But I entirely dissent from the opinion of the Register in the application he would make of this doctrine. And in doing this I must also dissent from the opinion of Judge Shipman, District Judge for the District of Connecticut, *in re* Williams, 2 N. B. R., 229, *octavo*. Judge Shipman there says: "The debt, therefore, * * * was extinguished by the judgment." "It no longer existed." "The judgment itself constitutes a debt; but it had no existence at the time of the adjudication of bankruptcy, and is not therefore provable against the bankrupt's estate." The whole difficulty in the application of this doctrine of merger by judgment to a case like the present, originates in a mistaken theory; and that theory is advanced in the first sentence of the language of the learned Judge above quoted, viz., that the debt is extinguished by the judgment. The *debt is not* extinguished. The instrument, contract, or obligation upon which the debt arose is extinguished, but not the debt. The debt remains. If this were not so, the judgment would destroy itself by extinguishing the very foundation upon which it is built. The debt was founded on contract; it is now founded on judgment, but it is nevertheless the same debt. A judgment operates to extinguish a debt only when it produces the fruits of a judgment. See *The Bank of the Metropolis* v. *Guttschlick*, 14 Pet., 19, 32; *United States* v. *Hoyt*, 1 Blatch., Chapters 326, 328, 9; *Clark* v. *Rowling*, 3 Com., 216.

The judgment operates as a change of remedy merely. It is a security of a higher nature than before. It is still but a security for the original cause of action. *Drake* v. *Campbell*, 3 East. 258, 9.

Again: It is often permitted in equity, and sometimes at law for particular purposes, to inquire into the claim or debt upon which the judgment is founded, not as a means enforcing the claim anew, but of showing the relations of the judgment and the judgment creditor to other things and persons. For instance, in the case of an attempt to enforce the collection of a judgment against property alleged to have been conveyed in

fraud of creditors, the judgment may not have been rendered until after the conveyance, in which case, so far as the judgment shows, the judgment creditor was not a creditor at all at the time of the conveyance, and therefore could not have been defrauded. In such cases the judgment creditor is always allowed to go back of his judgment and prove the claim or debt upon which it is founded; and if it appears that such claim existed at the time of the conveyance, the judgment creditor's relation of creditor will for this equitable purpose be allowed to relate back to that time, although it was anterior to the rendition of the judgment. Here the judgment creditor is allowed to show that the debt upon which the judgment was founded existed at a certain time in order to establish his right to attack the validity of the conveyance as against the judgment, and to have the judgment satisfied out of the property conveyed.

So, in the Bankruptcy Court, a court proceeding upon equitable principles, by parity of reasoning, the judgment creditor, in the absence of fraud or other evil practice in the obtaining of his judgment or in the use he has attempted to make of it, should be permitted to go back of his judgment and show what the claim or debt was upon which it was founded, and if it appears, as it does in this case, that such claim or debt was in existence at the time of filing the petition for adjudication of bankruptcy, his relation of creditor to the bankrupt's estate, although it is by judgment, should on equitable principles be allowed to relate back to that time, notwithstanding it was anterior to the rendition of the judgment; and he should be permitted to prove his judgment against the bankrupt's estate.

The criterion is, that *the debt* existed at the time of filing the petition, no matter whether the security or remedy has been changed or not, or in what form it may exist at the time it is presented; if it, the debt, existed at the proper time, it is provable.

It will be seen that I arrive practically at the same result as the learned District Judge of the Southern District of New York, *in re* Brown, 3 N. B. R., although by a somewhat dif-

ferent route. Judge Blatchford in that case, on page 146, uses the following language: "The judgment as such is not to be proved, but the amount of the debt or claim as it stood * * * is to be proved."

In this I do not concur. The "debt or claim as it stood" at the time of filing the petition, is merged in the judgment, and therefore the judgment must be proved, if anything; and I hold that the judgment is provable, not because it existed at the proper time, but because the debt constituting the foundation, the soul, the essence of the judgment, did exist at that time.

By taking this view of the subject, all difficulties vanish; every person will receive what justly and equitably belongs to him, without violating any principle of law or equity, or unsettling or disturbing any established doctrine, or coming in conflict with any of the provisions of the Bankrupt Act; if the bankrupt receives his final discharge, the judgment, being the thing directly acted upon by the bankruptcy proceedings, will be as effectually extinguished as if it were discharged upon the records of the court; and if he does not receive his discharge, the judgment will of course be satisfied to the full extent of the dividends which shall have been paid upon it.

The costs, however, which accrued subsequent to the filing of the petition for adjudication of bankruptcy do not stand upon the same footing as the judgment for the debt. Costs are not, like interest, an incident of the debt. They are an incident of the legal proceedings instituted and prosecuted for the collection of the debt; they are for reimbursement merely. Therefore, any costs which may have accrued subsequent to the time of filing the petition cannot be said to constitute a claim or debt existing at that time, and should be excluded in making up the amount upon which dividends are to be made in the bankruptcy proceedings.

Let it be certified accordingly.

J. W. Longyear, *District Judge.*

John J. Speed appeared and argued the case in behalf of Mr. Butler.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Whether a creditor who had received a conveyance of property made with intent to defeat or delay the operation of the Bankrupt Act, having reasonable cause to believe a fraud on the Bankrupt Act was intended, may prove his claim and vote for assignee?

At the time of the delivery of the bond and mortgages, an act of bankruptcy was close at hand, the mortgagee, of the firm Allan Shelden & Co., being well apprised of the facts.

The assignment was not general, for the benefit of all the creditors, but conditional; the mortgagee having no power whatever over the *real* property for six months, and the *personal* property encumbered by a specific reservation.

The motion was to exclude the firm of Allan Shelden & Co., and other creditors who had expressed themselves satisfied with the transaction, from participation in the choice of assignee, and to postpone the proof of their claims.

Held, 1. It is *the character of the instrument* which is the subject of discussion; and if the exercise of the powers granted by it would defeat or delay the operation of the Bankrupt Act, then such would be presumed to have been its intention.

2. The disposition of property under it was complete on the day of the execution and delivery of the bond and mortgages; and the intent existing at that time determines the character of the transaction.

3. The proof of the claim of Allan Shelden & Co. should be postponed until after the choice of an assignee.

4. The motion to exclude the other creditors mentioned from participation in the choice of assignee, ought to be denied.

In re ELI B. CHAMBERLAIN AND OWEN P. CHAMBERLAIN.

AT Detroit, on the 28th of March, 1870. Before Mr. Hovey K. Clarke, Register in Bankruptcy.

I, the said Register, do hereby certify that in the course of proceedings before me at the meeting of creditors for the choice of an assignee of said bankrupt's estate, the attorney for the petitioning creditors moved that the proof of the claim tendered by Allan Shelden & Co., and the proofs of the claims filed by Beatty, Fitzsimons & Co., A. C. McGraw & Co., W. D. Robinson, Burtenshaw & Co., E. Lieberman, and Geo. B. Kelley & Co., be postponed until the assignee is chosen, on the ground that said claimants had received a conveyance of the property of said bankrupts, made with intent to defeat or delay the operation of the Bankrupt Act, having reasonable cause to believe that a fraud upon the Bankrupt Act was intended, and that said bankrupts were insolvent. The said claimants being

present and insisting upon their right to vote for assignee, questions of fact and law were presented and stated by the parties, Mr. Dickinson appearing for the petitioning creditors and Mr. Driggs for the claimants whose rights to vote were objected to, and thereupon witnesses were examined relative to the facts in controversy between the parties.

FACTS.

In April, 1869, the bankrupts, then doing business as partners in Brockway, St. Clair county, finding themselves in embarrassed circumstances, sought an interview with Mr. Allan Shelden, of the firm of Allan Shelden & Co., and stated to him that their stock had been attached; that one of their creditors would probably take a judgment against them the next day, and, as Mr. Shelden thinks, the other creditors would take judgments against them at the same term of court. That this statement truly represented the then existing condition of the affairs of the Chamberlains is not controverted. This interview resulted, after consultation with counsel, in the execution by the bankrupts and the delivery to Mr. Shelden of a bond, bearing date April 22d, 1869, in the penal sum of eighteen thousand dollars, reciting the indebtedness of the Chamberlains to various persons and firms, in divers sums of money—neither names of persons nor sums of indebtedness being specified—amounting in the aggregate to about nine thousand dollars, as near as they could estimate the same, and which they further recite "they are desirous of securing." The condition of the bond is declared to be the payment within six months or sooner, if they should be able to do so, of all just debts which they were then owing and liable to pay, with interest; and also to pay any future indebtedness which they may incur to the firm of Allan Shelden & Co., for goods or merchandise which said firm may advance to them. The performance of the condition of this bond was secured by two mortgages, one upon a considerable quantity of real estate in the counties of St. Clair and Sanilac, and a chattel mortgage of all the personal property of the Chamberlains in their store at Brockway, of a quantity

of lumber and saw logs, and some other specified articles. The chattel mortgage contained the further condition that the mortgagors "may sell any or all 'of the property above described in the usual course of business, the avails of such sales to be applied in accordance with the condition of the bond above referred to. The party of the second part may at any time take possession of the property hereby mortgaged."

The trust created by these instruments was accepted by Mr. Shelden; the greater part of the personal property has been sold, and a considerable portion of it converted into money. No subsequent advances have been made by the firm of A. Shelden & Co., as provided for in the bond.

It does not appear that any of the creditors whose right to vote for assignee is objected to, had any knowledge of the transaction between the Chamberlains and Mr. Shelden previous to the execution and delivery of the papers. They all, however, in terms more or less explicit, have since the transaction expressed themselves satisfied with it.

OPINION OF THE REGISTER.

It is clear that at the time of the interview with Mr. Shelden the Chamberlains were insolvent. They were unable to pay their debts in the ordinary course of business, and this inability was of a character, as the proof shows, which would result in the eventual breaking up of their business. Their goods were attached, several suits were pending against them, on one of which it was expected judgment would be entered the next day, and on the others during the same term of the court. In these circumstances, it is evident, an act of bankruptcy was close at hand. If they remained inactive, they had reason to expect that an execution would be levied on their property within forty-eight hours. To remain thus inactive would be to "suffer their property to be taken on legal process," which would justify a proceeding by their creditors against them to have them adjudicated bankrupts. *In re* Black and Secor, 1 N. B. R., 353; *in re* Dibble, 2 N. B. R., 617. They could prevent this by filing a voluntary petition to be adjudged bankrupts. By one

or the other of these methods an act of bankruptcy seemed inevitable. By resorting to the voluntary method they could have effectually precluded the involuntary, and they would have submitted all their property to be distributed as provided by the law of the land, and under the control and guaranties that the rights of all creditors will be protected, which those laws afford. For some reason which is not stated, and which therefore can only be inferred from their acts, they do not resort to the method prescribed by the Bankrupt Act to prevent the preference which the judgment creditors were likely to obtain. They state their condition to Mr. Shelden, so that he becomes well informed as to all the essential facts affecting their liabilities and their duties, and, after consultation with counsel, the method of the bond and mortgages which have been proved in this case, was adopted to prevent the levy of the impending execution. It is insisted that this was done to protect the property for the benefit of all the creditors, the proceeds of which were to be distributed among them equally without preference.

It is to be observed, however, that the conveyance to Shelden was not a general assignment for the benefit of the creditors, such as would authorize him to proceed at once to convert the property and distribute the proceeds. The conveyances are conditional—one mortgage on the real estate, and the other upon personal property—conditioned to pay all the mortgagors' creditors, and also what they may in addition become indebted to A. Shelden & Co. within six months; during which period Shelden could exercise no rights whatever over the real property, and his right to take possession of the personal property was encumbered by a reservation of the mortgagors' right to continue to sell the property mortgaged in the usual course of business. If this were a general assignment for the benefit of creditors, it is difficult to see how it could be sustained under the well settled principles which require such an assignment to fix definitely the rights of the parties and of those to be benefited by it, and especially to be free from all control whatever by the assignor of the property assigned. The reservation of the right to continue to sell the mortgaged prop-

erty, and the agreement that the security should embrace any subsequent indebtedness of the Chamberlains to the firm of A. Shelden & Co., are clearly inconsistent with the principles above referred to, and which are supposed to be well settled as applicable to the construction of assignments for the benefit of creditors. Instead of making an unconditional surrender of their property for the benefit of their creditors, they seek to convert it into a special trust, by which, at the option of the parties, it may be employed indefinitely as a basis on which to continue their business; and if they were doing an unprofitable business, the property which ought to be distributed to creditors, existing at the time of the transaction, may be used to protect the interests of the firm in which the trustee was a partner, against loss from the business thus continued. It is no answer to this to say that this power was not actually exercised —that no further advances were made. It is *the character of the instrument* which is the subject of discussion; and if the exercise of the powers granted by it would defeat or delay the operation of the Bankrupt Act, then such will be presumed to have been its intention. The disposition of property under it was complete on the day of the execution and delivery of the bond and mortgages; and the intent existing at that time determines the character of the transaction.

As mortgages, however, the same objections recur with increased force, and establish the inconsistency of such conveyances with the general policy of the Bankrupt Act not only, but the provisions of Section 39 of that act in particular. The general policy of the Bankrupt Act demands that the property of an insolvent shall be taken charge of by the officers of the Bankrupt Court, where all creditors have an opportunity to assert their rights, where the utmost publicity as to all proceedings is secured, and where the bankrupt's estate is to be converted and distributed by public officers, directed and controlled by a statute which provides speedy and summary methods to enforce it and protect the rights of all parties.

In this case, the Chamberlains were in circumstances that inactivity merely would expose them within forty-eight hours,

probably, to the compulsory process of the Bankrupt Court. They might avoid it by becoming voluntary petitioners to be adjudicated bankrupts. They decline to do this, and execute instead certain mortgages, which if valid, not only set their creditors at defiance for six months, but secure for them the right, with the consent of a party selected by themselves, to continue their business, including the purchase of more goods, until a breach of the condition of the mortgages. If they can do this legally for six months, it is difficult to see how in principle they can be restrained from securing like immunity for six years by the same method. Its effect, unquestionably, is not only to delay the operation of the Bankrupt Act, but if sustainable at all, may be employed to defeat it altogether. The involuntary clauses of the Bankrupt Act may as well be repealed—for a time mortgage will be always effectual to set them all at defiance. Such is the practical and necessary effect of such a disposition of property as is proved in this case; and the law conclusively presumes that such effect was intended by the parties to it.

Who were the parties to it? The two Chamberlains, the bankrupts, and Mr. Allan Shelden. All the facts which give character to the transaction are shown to be known to Mr. Shelden before he took the bond and mortgages. The intent of the mortgagors is thus brought home to the mortgagee, and the consequences, as declared by the last sentences of Section 39, that a creditor having "reasonable cause to believe that a fraud on the act was intended, and that the debtor was insolvent, shall not be allowed to prove his debt in bankruptcy," the petitioning creditors contend exclude the proof of the debt due to Allan Shelden & Co., and at any rate are sufficient to justify the postponement of the proof of the claim until after the choice of an assignee. I do not understand that any point has been made that the objections which might exist to the proof of a claim by Allan Shelden, on account of his participation with the bankrupts in the purpose to defeat or delay the operation of the act, do not apply to Allan Shelden & Co. If proved at all, it must be proved in favor of all the partners—as

creditors they cannot sever. The penalty therefore which the act imposes cannot be visited upon Mr. Shelden unless his partners are also involved in its effect. It is unnecessary, however, to discuss this question, for whatever there may be in it, enough I think appears to require the postponement of the proof of the claim of Allan Shelden & Co., until after the choice of an assignee.

The motion to exclude the other creditors named, to wit: Messrs. Beatty & Fitzsimons, A. C. McGraw & Co., W. D. Robinson, Burtenshaw & Co., E. Lieberman, and George B. Kelley & Co., rests upon the proof that they have expressed themselves as satisfied with the arrangement entered into between the bankrupts and Mr. Shelden. It does not appear that they had any knowledge whatever of the facts that make up the intent to defeat the operation of the Bankrupt Act, until after the bond and mortgages were given, nor that they were consulted concerning it, or in any way accepted it, except to declare that they were satisfied with it. In no sense can it be said that they have received the conveyances which it is alleged were given, with the intent to defeat the operation of the Bankrupt Act. The conveyances were not *to* them directly or indirectly; they were complete before these creditors had any knowledge of them. There is, therefore, not only no proof of the alleged intent, but there is no fact proved from which any such intent on their part can be inferred.

I am of opinion, therefore, that the motion to exclude them from participation in the choice of an assignee ought to be denied.

HOVEY K. CLARKE,
Register.

I fully concur in and approve of the foregoing views and conclusions of the Register.

J. W. LONGYEAR,
District Judge.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where the bankrupt suffered his property to be taken on legal process, under an execution issued in the Marine Court, intending to give a preference to certain creditors, the assignee prays that such lien may be declared void. By order of this court, the property was delivered to the assignee, subject to the determination of this court, the proceeds to be kept separate from the other estate. Counsel object that it is wholly irregular, because it was not brought upon a plenary bill in equity, etc.

***Held*, the petition is dismissed without costs to either party as against the other, with leave to the execution creditors to file a bill in equity, or bring an action within thirty days.**

In re LEONARD S. BALLOU.

BLATCHFORD, J.—On the proofs in this case, I regard it as established that the bankrupt, on the 9th October, 1869 (the petition in bankruptcy having been filed on the 16th October, 1869), being insolvent, suffered his property to be taken on legal process, in favor of the firm of E. S. Jaffray & Co., under an execution issued on that day in the Marine Court of the City of New York, by that firm, against him for four hundred and eighty-six dollars and eighty cents; that the bankrupt intended thereby to give a preference to that firm as his creditors, they being such at the time; and that that firm had reasonable cause to believe at the time that the bankrupt was insolvent, and that a fraud on the Bankrupt Act was intended. The transaction was, therefore, void, under the 35th Section of the act, and no valid lien was acquired in favor of the firm by the taking under the execution. The petition of the assignee prays that such lien may be declared void. The answer of the firm to that petition, which answer was verified on the 17th December, 1869, and filed on the next day, prays that the levy under the execution may be adjudged to be a valid lien, and that the assignee may be ordered to satisfy the execution out of the proceeds of the sale of the property. It appears by the proofs that the property levied upon under the execution was, on or about the 14th December, 1869, under an order made by this court on that day, delivered to the assignee, the order providing that he should hold the proceeds separate from

the other estate of the bankrupt, subject to the determination of this court on the petition filed by the assignee to ascertain the validity of the lien claimed by the firm, and that none of the rights or liens of the firm should be prejudiced by the order. It also appears that the property has been sold by the assignee, and that its proceeds have been kept separate to abide the order of this court.

The objection was taken at the hearing by the counsel for the firm, that inasmuch as the proceeding instituted by the petition of the assignee is one against the firm as claiming an adverse interest touching property or rights of property of the bankrupt, transferable to or vested in the assignee, it is wholly irregular, because it was not brought upon a plenary bill in equity, but by a summary petition and order to show cause. On the authority of the recent decision made in the Circuit Court for this district, *in re* Bonesteel, 3 N. B. R., 127, this objection must be held to be well taken. As the petition falls, the answer must fall with it, and also the prayer of the answer, that the assignee may be ordered to satisfy the execution out of the proceeds of the sale of the property levied upon. The petition is therefore dismissed, but without costs to either party as against the other, and as the fund in question is in the hands of the assignee, leave is given to the execution creditors to file a bill in equity, or bring an action at law, as they shall be advised, against the assignee in a proper court, for the enforcement of such rights as they shall seek to claim against the assignee in the premises, provided that it be done in thirty days herefrom, at the expiration of which time, if it be not done, the assignee may apply for directions as to the fund.

G. A. Seixas, for the assignee.

F. N. Bangs, for the execution creditors.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where a legal adviser refuses to be sworn as a witness,
***Held*, the right to refuse to answer a question on the ground of privilege, does not warrant a refusal to be sworn as a witness.**

In re GEORGE WOODWARD AND JULIUS C. WOODWARD.

THE undersigned Register in bankruptcy, having in charge the proceedings in this bankruptcy, hereby certifies that, on the 9th day of April, 1870, the assignee herein, by Mr. Bowman, his counsel, attended before the undersigned, and that Mr. William McKeag also attended as a witness. That thereupon the undersigned proposed to administer to Mr. McKeag the customary oath as a witness, under the 7th Section of the Bankrupt Act. That said Mr. McKeag declined to take the oath or to be sworn at all as a witness in the matter, on the ground that he had acted as counsel to the bankrupt, and was still his adviser.

That Mr. Bowman thereupon asked that the question whether the said Mr. McKeag could refuse to be sworn or to testify in the matter for the reason given by him, might be certified to the court for the opinion of the court thereon.

OPINION OF THE REGISTER.

The right to refuse to answer a question on the ground of privilege, does not warrant a refusal to be sworn as a witness. The privilege cannot be interposed until a question is asked which invades the privilege. Mr. McKeag should have submitted to be sworn.

ISAAC DAYTON,
Register.

BLATCHFORD, J.—The decision of the Register is correct.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

To entitle a bankrupt to discharge, the proceeds of his property to be divided among his creditors must be equal to fifty per cent. at the time of the hearing of the application for the discharge before the Register.

In re CHARLES C. WEBB AND THOMAS H. TAYLOR.

UPON the application of the above-named bankrupts for final discharge, the following is the decision of the court:

BLATCHFORD, J.—The proceeds of the bankrupts' property in the hands of their assignee, subject to be divided among their creditors, must, at the time of the hearing of the application for their discharge before the Register, be then equal to fifty per centum of the amount of the claims proved against their estate, on which they are liable as principal debtors, in order to entitle them to discharge, unless the assent named in Section 33 is filed. I concur with the view taken in *re* Frederick, 3 N. B. R., 465.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Certain workmen employed by bankrupt within six months before bankruptcy, were not paid, and applied to L. to advance money on their claims, to enable them to reach their homes, at a distance; L. to be reimbursed the advance, interest thereon, and necessary expenses incurred. An absolute assignment was executed by each to L., having been drawn by a person not a lawyer. L. applies to be paid from the bankrupt's estate the amount so advanced out of fifty dollars to be allowed to each workman as prior liens.

Held, the claims and demands in question should be allowed.

In re STEPHEN BROWN.

THE bankrupt was a brick-maker, and employed a large number of laborers at Coxsackie, Greene county, N. Y., where his business was located; and on or about the 20th December, 1869, settled with the laborers hereinafter mentioned, and a balance was struck and the amount set opposite to their respective names found due to them and each of them, for labor per-

formed, by the bankrupt, within six months prior to the filing of his petition.

To wit:

Henry Naseher	$141 85
Anthony Lavere	215 30
John Boushire	192 01
Nelson Boushire	134 70
David Boushire	141 63
Ambrose Petie	113 67
Edward Perso	136 23
Morris Messay	92 42
Augustus Demore	119 90
William Santain	53 81
Maxim Santain	87 98

That such laborers and each of them were Canadian Frenchmen who came to Coxsackie to labor during the brick-making season, and, at the end of the season, receiving their wages, to return again to Canada, where they reside. That on or about the 21st December, 1869, after the season of labor was ended and they had settled up with their employer, the bankrupt, and found the amount due each of them, respectively, as above stated, the said bankrupt had no money to pay them. That one Larue advanced ten dollars to each of said persons, on the respective account of each, under an agreement that he, said Larue, was to draw the money of each of said persons, and pay himself the ten dollars and interest, and any expense necessarily incurred, and pay over to each of said persons the whole balance of the money due to such persons for labor as aforesaid.

That in order to carry out such arrangement, the parties went to Simpson S. Bell, who was not a lawyer, but a Justice of the Peace, who drew up papers for the purpose of carrying out such agreement. That said Bell drew up an absolute assignment of each of said claims, which was signed by each of said parties and by said Bell as a witness, and delivered such papers to Henry Larue, who then and there paid over ten dollars ($10.00) to each of said parties, besides paying two or three dollars for stamps and expenses, which money the parties (laborers) respectively received and went to Canada, where they now reside, or where most of them do reside.

In re Brown.

Henry Larue appeared before the Register on the 4th of April, 1870, at Catskill, in person, and by his attorney, Wm. E. Leete, of Coxsackie, New York, and presented to the Register the said written assignments of said demands, and by his said attorney submitted to said Register orally, and also in writing of a prior date, a demand that such claims be allowed against the said estate respectively to each of the persons above-named, and that they be entitled respectively to a priority or preference to the amount of fifty dollars each, being for wages due to an operative, for labor performed within six months next preceding the adjudication in bankruptcy in this cause, under and by virtue of Section 27 of the Bankrupt Act of 1867; the assignee claimed and demanded of the aforesaid Register, that after paying the said Henry Larue the amount of money actually paid out, and interest and expenses as aforesaid, the balance of the said claim be paid over to the said persons, their attorneys, executors, administrators, or assigns, respectively; and the said Henry Larue now claims and demands that this court allow and pay for the benefit of each of said laborers the sum of fifty dollars ($50) each, out of said bankrupt's estate, as being a lien or liens prior to other creditors, on account of each of said claims, being for the labor of an operative, for labor performed within six months next preceding the adjudication of bankruptcy in this matter.

WM. E. LEETE, *Attorney.*

Respectfully forwarded for disposal of his Honor Judge Blatchford.

THEODORE B. GATES, *Register.*

BLATCHFORD, J.—The claims and demands above named ought to be allowed by the Register and the assignee.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where A, a merchant, holding a large sum of money belonging to B, a foreigner, was authorized to invest it in certain stock, which he did in his own name. He afterwards became bankrupt; and the certificate of stock having been deposited as security for money advanced by the Phenix Bank, could not be recovered either by the bankrupt or his solicitor. Application is made to court that the securities may be paid over to B.

Held, the securities must be passed to the assignee in bankruptcy. He is a creditor only for that amount, and can only participate in dividends with other creditors.

EDWARD L. UNGEWITTER *v.* WILLIAM VON SACHS, *Assignee in bankruptcy of* JOHN F. SCHEPELER *and others, composing the firm of* SCHEPELER & Co., *and the firm of* BOWDOIN, LAROCQUE & BARLOW.

In Equity.

BLATCHFORD, J.—This is a final hearing on pleadings and proofs in a suit in equity. The suit is brought to determine whether the plaintiff or the assignee in bankruptcy of Schepeler & Co. is entitled to certain moneys in the hands of the defendants, Bowdoin, Larocque & Barlow. The plaintiff being a resident of Wurzburg in Bavaria, and having funds in the hands of Schepeler & Co., requested them in 1862 and 1863, to invest for him in the stock of the Metropolitan Gas Light Company, a New York Corporation, sufficient of those funds to amount to five thousand six hundred dollars, at par of such stock. They did so, subscribing for fifty-six shares of the par value of one hundred dollars each, and advising him that it was an investment for his account, and speaking of the fifty-six shares in their letters to him as his shares. They collected dividends from time to time on the fifty-six shares, and advised him of such collection. They in fact took the fifty-six shares in their own name, but he was not advised as to whether the shares were in his name or not. They made a single subscription in their own names for ninety-eight shares, of which the fifty-six shares formed a part, twenty-nine shares belonging to another party, and thirteen shares to themselves. The ninety-eight shares stood in their own names on the books of the Company at all times, and they

received a certificate for ninety-eight shares in their own names from the Company in 1863. As early as October, 1864, Schepeler & Co. hypothecated this certificate with the Phenix Bank of the City of New York as security for money then loaned by that bank to them, and it always afterwards remained in the possession of that bank or of its succcessor, the Phenix National Bank, under a pledge for money loaned, the loan being renewed from time to time. The last renewal was in May, 1868, a loan which never was paid in full, but amounted to sixty-seven thousand five hundred dollars at the time of the failure of Schepeler & Co.

Schepeler & Co. failed on the 15th of May, 1869. On that day, and at a time when they were insolvent and knew themselves to be so, or else were contemplating insolvency as inevitable, one of the firm went to the office of Bowdoin, Larocque & Barlow, the legal advisers of the firm, and after making known to them the state of their pecuniary affairs and the fact that the Phenix National Bank held on pledge the eighty-five shares of the Metropolitan Gas Light Company stock and other securities, which really belonged to other persons than Schepeler & Co., put into the hands of Bowdoin, Larocque & Barlow certain securities, which, or the proceeds of which, he requested should be used to replace or repurchase the eighty-five shares of stock and the other securities so really belonging to other persons, and also signed and delivered to Bowdoin, Larocque & Barlow a written order on the bank, requesting them to deliver to Bowdoin, Larocque & Barlow the eighty-five shares of stock and certain other specified securities. The eighty-five shares of stock were not delivered up by the bank, and were not replaced or repurchased. Bowdoin, Larocque & Barlow applied to the bank and offered to redeem such stock a few days after the failure of Schepeler & Co., and to pay the highest market price for it, but the offer was refused. The offer was renewed a week or two later and refused again. The securities so placed in the hands of Bowdoin, Larocque & Barlow having been sold, there remained in their hands, of the proceeds, after deducting what was expended in the redemption of the other securities

which were to be redeemed, a sum of money which, with interest to the 11th of November, 1869, amounted on that day to eleven thousand nine hundred and eighty-one dollars and ninety-nine cents. That sum was on that day deposited by Bowdoin, Larocque & Barlow in the New York Life Insurance & Trust Company to their own credit, payable after ten days' notice with interest at four per cent. per annum, and they received therefor a certificate of deposit, which they hold subject to the decree of this court as to who is entitled to the money which it represents.

The claim of the plaintiff is that the money in the hands of Bowdoin, Larocque & Barlow represents the eighty-five shares of stock, and that the proportion of it which represents fifty-six shares ought to be paid to him, and ought not to go to the assignee in bankruptcy.

However great a breach of trust was committed by Schepeler & Co. towards the plaintiff, yet, on the facts of the case, Schepeler & Co., when they became insolvent, were merely debtors to the plaintiff for the value of the fifty-six shares of stock, as against their other creditors, now represented by the assignee in bankruptcy, and as respected the rights of such other creditors under the Bankrupt Act. The securities themselves, whose sale has resulted in the proceeds in question, never belonged to the plaintiff, and so far as appears, were not, prior to the time when the rights of the assignee in bankruptcy intervened, put into the hands of the plaintiff, or of any agent of his, or of any person with his assent or privity, nor was the placing of such securities in the hands of Bowdoin, Larocque & Barlow made known to the plaintiff, or adopted or verified by him prior to the transfer of the title to them to the assignee in bankruptcy. The property in them was in no manner changed, nor did any legal or equitable lien, or interest, or trust, or charge arise in respect to them, which would not have been revocable by Schepeler & Co. themselves, at least at all times before the transaction was made known to the plaintiff. It was not made known to the plaintiff, or to any agent of his, until some time after the appointment of the assignee in bankruptcy.

Such appointment must, on the facts, be considered a revocation of anything done by Schepeler & Co., if any such revocation were needed.

Moreover, the delivery of the securities having been made for a specified purpose, and the purpose not having been carried out, because of the refusal of the bank to deliver the shares, the property in the securities remained in Schepeler & Co., and passed to the assignee in bankruptcy free and clear from any charge in favor of the plaintiff.

Independently, however, of these views, the court is in fact asked to do, in favor of the plaintiff, what the Bankrupt Act expressly forbids: It is asked to give to the plaintiff, as a creditor, a preference. If Schepeler & Co. had given directly to the plaintiff himself the securities which they placed in the hands of Bowdoin, Larocque & Barlow, they being then insolvent, or acting in contemplation of insolvency, and intending to prefer the plaintiff, and he having the knowledge which Bowdoin, Larocque & Barlow had, the transaction would have been a fraud on the act and void, and the assignee could have recovered back the securities or their value from the plaintiff.

The bill must be dismissed with costs.

B. Roelker, for the plaintiff.

T. C. F. Buckley and *J. K. Hill*, for the assignee in bankruptcy.

W. W. McFarland, for Bowdoin, Larocque & Barlow.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

A creditor on information alleged to have been acquired after bankrupt's discharge, applied to have the discharge annulled for fraud in the bankrupt concealing property from his creditors.

Held, the allegations being unsupported by sufficient evidence, the objections to the discharge fail, and creditor's petition dismissed with costs.

In re CHARLES A. STETSON.

BLATCHFORD, J.—In this case the bankrupt received his discharge on the 3d of February, 1868. On the 28th of March,

1868, a petition was filed by Calixte Harvier, a creditor of the bankrupt, praying the court to vacate and annul such discharge. The petition set forth as grounds for the relief asked: 1st. That the creditor had no notice of the filing of the bankrupt's petition, or of his adjudication, until the 3d of February, 1868, and was not served with a notice that a warrant had been issued, and that a meeting of creditors would be held to prove their debts, and choose an assignee, as required by Section 11 of the act. 2d. That the bankrupt in his petition and schedules willfully omitted to mention the profits of the Astor House since 1860, in the hands of John E. Develin, but held by him in trust for the bankrupt, and a house at Lynn, Massachusetts, the title of which was in the wife of the bankrupt, but which belonged to him and was purchased with his money. 3d. That the bankrupt was guilty of fraud and negligence in that he did not deliver to his assignee property which belonged to him at the time he presented his petition and inventory, namely, the said profits and the said house. 4th. That with intent to defraud his creditors, he admitted, in the proceedings in bankruptcy, three false and fictitious debts in favor of the said Develin against his, the bankrupt's estate, and knowing that such debts had been proved and that the same were false and fictitious, did not declare the same to his assignee within one month after such knowledge. 5th. That after the passage of the Bankrupt Act, he made to the said Develin a fraudulent transfer of the profits arising out of the Astor House, contrary to the provisions of the Bankrupt Act. The petition alleges that the creditor had no knowledge of these things until after the discharge, and no opportunity, if they had come to his knowledge, of availing himself thereof, in opposing the discharge, by reason of such want of notice. The creditor contends that the bankrupt was at all times, after the year 1860, the proprietor of the Astor House, and really a partner with the said Develin, and was the head and principal of the establishment, and it was carried on by his ability, experience, and skill, and he was the owner, and entitled to a large share of the profits thereof; that the said Develin, who was the ostensible

proprietor, had no agency in the keeping of the hotel, except that he held in his own name a lease of the same, running until 1870; that Develin had not kept the hotel, or performed any of the duties of a hotel-keeper, but the hotel had been, since 1860, kept by the bankrupt, who was entitled, in consideration of his ability in the art and mystery of hotel-keeping, to the profits thereof; Develin being entitled to only such ratable compensation as the taking of a lease was worth; that a portion of the profits of the establishment had been invested in a house at Lynn, Massachusetts, which in fact belonged to the bankrupt, although he gave out that it was given by Develin to his, the bankrupt's wife, and that the profits of the Astor House, since 1860, were the property of the bankrupt, and were not mentioned in his schedules.

In regard to notice to the creditor, the papers show that notices of the issuing of the warrant and of the first meeting of creditors were duly published, and that a like notice containing the name of Mr. Harvier, as a creditor, and a statement of his residence and of the amount of his debt, and the other matters required, was duly served by mail on Mr. Harvier. If he did not receive it, that fact cannot affect the regularity of the proceeding. But it is quite clear on the evidence of Mr. Harvier, that he attended the first meeting of the creditors of the bankrupt. That meeting was held on the 13th of November, 1867, and was adjourned until the next day, when an assignee was appointed. The petition for discharge was filed on the 24th of December, 1867. The order to show cause against the discharge was returnable on the 21st of January, 1868. On that day, Macy & Jenkins, creditors, appeared and gave notice of opposition to the discharge. On the 27th of January, a summons to the bankrupt to attend and be examined on the 28th was issued by the Register on the application of Macy & Jenkins. On the 28th the bankrupt was examined by the attorney for Macy & Jenkins, and his deposition shows that he was inquired of respecting the matters now raised in regard to his connection with the Astor House since 1860, and in regard to the house at Lynn, and that he testified regarding those

matters. As the result, no specifications were filed by Macy & Jenkins. Mr. Harvier, on the 28th, obtained from the office of the clerk of the Supreme Court of the State of New York, in the city of New York, a certified transcript of the docket of a judgment recovered by him in 1860, against the bankrupt and another person, and on the 29th deposed before a Register, not the one to whom this case was referred, to a proof of his debt, to which such certified transcript was annexed. Whether such proof was presented to the Register in charge of this case does not appear. It was filed with the clerk of this court on the 17th of February, 1868. The papers show that thirteen creditors had proved their debts, and that they were served with notices of the hearing on the application for discharge. The Register's final certificate was made on the 1st of February, and the discharge was granted on the 3d. These facts are alluded to as indicating that the matter of the relations of the bankrupt to the Astor House, subsequently to 1860, and of the *status* of the house at Lynn, were made a subject of inquiry by creditors, with reference to a discharge, and that none of those who had proved their debts deemed the facts to be such as to warrant the filing of specifications in opposition to a discharge.

On the merits, I think that the creditor fails altogether, on the proofs now taken, in establishing that the bankrupt had, after 1860, any interest in the profits of the Astor House, or that any part of the same was held in trust for him by Mr. Develin, or that the house at Lynn belonged to him or was purchased with his money. It is quite clear on the evidence, that the bankrupt was not, at any time after 1860, the proprietor of the Astor House, or a partner with Mr. Develin, or the proprietor of the establishment, or entitled to any share of its profits. Mr. Develin was the real as well as the ostensible proprietor and keeper of the hotel. He paid to the bankrupt a salary for certain services rendered at the hotel, and allowed him to reside there, being the son-in-law of the bankrupt, and residing himself with his family at the hotel during a part of each year; he permitted the bankrupt's wife and three unmar-

ried daughters of her and of the bankrupt to reside at the hotel, and also furnished them with money out of his own means towards their support. This he testifies was regarded as part of the bankrupt's compensation. Whatever sum it amounted to was expended and used. In addition, Mr. Develin, as was not unnatural from his relationship to the bankrupt's wife and daughters, invested some money for the benefit of the bankrupt's wife and her daughters, the income to go to the wife during her life, and the principal to the daughters at her decease, the whole being put in trust. This money was his own, and was a free gift by him. So, also, the money invested at the house at Lynn, which is held in trust for the bankrupt's wife and her daughters, is not shown to have been the money of the bankrupt.

Instead of three debts in favor of Mr. Develin, but two were proved, and they are shown to have been valid and subsisting debts, and not at all fictitious.

The objections to the discharge fail, and it must stand, and the petition of the creditor be dismissed with costs.

W. Watson, for the creditor.

T. Burwell, for the bankrupt.

SUPREME COURT, NEW YORK—FIRST DISTRICT.

Motion by assignee to be made a party to actions brought to recover possession of certain tobacco alleged to have been wrongfully taken and converted by defendant, afterwards declared bankrupt.

Held, the assignee should show some right to the property in controversy in order to make him a party. Such conversion by his principal is of itself not a good reason for supposing he has right to the property in question. Motion denied.

In re L. W. GUNTHER *and another v.* THOMPSON GREENFIELD *and another;* MAX RAEDER *v. Same.*

MOTION on the part of Samuel A. Sawyer, assignee of Thompson Greenfield, a bankrupt, to be made a party defendant in the above actions.

These actions were brought to recover possession of certain

tobacco alleged to have been wrongfully taken and converted by the defendant Greenfield, and the tobacco seized by the sheriff and delivered to the plaintiff.

The defendant appeared in the actions and put in answers denying the conversion.

Shortly afterwards, proceedings were commenced by one of Greenfield's creditors, to have him declared a bankrupt, and in these proceedings he was declared a bankrupt, and Samuel A. Sawyer was chosen assignee in bankruptcy.

The assignee in bankruptcy now makes this application on affidavit, setting out these facts.

INGRAHAM, J.—The assignee should show that he has some right to the property in controversy.

There is no good reason for making him a party to a protracted litigation solely because his principal was guilty of a conversion of property or some similar act, without showing there is good reason for supposing he has some right to the property.

Motions in both cases are denied, with leave to renew upon other papers and paying costs of this motion.

Goepp & Stern, attorneys for assignee.

James K. Hill, attorney for Raeder.

R. P. Lee, attorney for Gunther.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A bankrupt, in July, 1867, gave D. a mortgage upon the fixtures and tools in his factory, which recited that D. had indorsed notes for him on a promise of security. The condition was that the bankrupt, his executors, administrators, and assigns should, at or before the expiration of nine months from the date of the mortgage, pay certain promissory notes and save D. harmless from the payment of the same. One note was then described, and the condition proceeded: "and any and all notes given and indorsed by said D., for the accommodation of the said bankrupt during the pendency of this deed." The note described in the deed, and all other notes given or indorsed within nine months after the date of the deed were paid, but the parties continued in their course of dealing, and there were outstanding at the time of the bankruptcy, in January,

1869, notes of the like description to a greater amount than the value of the mortgaged chattels.

Held, that the mortgage deed secured the notes made and indorsed after nine months from its date, and that the notes outstanding at the time of bankruptcy were secured thereby.

An unrecorded mortgage of personal property which has not been delivered to and retained by the mortgagee, is valid against the assignee in bankruptcy of the mortgagor.

In re CHARLES W. GRIFFITHS.

THE agreed statement shows that in July, 1867, Griffiths lived and had his principal place of business in Boston, and had a factory in the adjoining city of Roxbury, which has since been annexed to Boston. In that month he gave petitioner, Dolby, a mortgage upon the fixtures and tools in his factory, which recites that Dolby had indorsed notes for him on a promise of security; and the condition is that Griffiths, his executors, administrators, and assigns shall, at or before the expiration of nine months from the date of the mortgage, pay certain promissory notes, and save Dolby harmless from the payment of the same, or any part thereof; said certain notes being described as follows, to wit:—One note is then described, and the condition proceeds,—"and any and all notes given or indorsed by said Dolby for the accommodation of the said C. W. Griffiths & Co., during the pendency of this deed," etc. The mortgage was recorded in Roxbury, whereas by law it should have been recorded in Boston, and no possession was taken under it. The note described in the deed, and all other notes given or indorsed within nine months after the date of the deed, have been paid; but the parties continued in the same course of dealing, and there were outstanding at the time of the bankruptcy, in January, 1869, notes of the like description, to a greater amount than the value of the mortgaged chattels. The property was sold by the assignees by consent, and this petition asks that the proceeds may be paid to the mortgagee.

The assignees contend that the deed itself does not purport to secure any notes not made or indorsed within nine months of its date, and that it is not valid against them for want of due record.

The deed is undoubtedly obscure. What "the pendency of

the deed" is, may well be a question. It can hardly mean the nine months, because that is merely the time limited for certain notes which purport to be described; though only one is in fact described, the facts show that there were others then existing, to which the security was certainly intended to apply. After the nine months, the deed would still be pending, if there were a breach. The most favorable construction that I can give for the assignees is this: That so long as the mortgage remained a valid and existing lien upon the property, it should secure all notes of the kind mentioned in it. Now, there was no time, up to the date of the bankruptcy, when notes were not outstanding; no time when the mortgagor could have called upon the mortgagee to cancel his security, on the ground that he was no longer liable as indorser for accommodation of the mortgagor; the course of dealing was continuous, and the proceeds of new notes were used, in fact, to take up the old notes. But I am much inclined to think that the true reading of the deed is, that it should secure all notes of the kind mentioned until it should be given up, or in some way canceled or abrogated. In either view, it secures the notes mentioned in the agreed statement.

The important question of law remains to be considered, whether such a mortgage, not duly recorded, is good against the assignee in bankruptcy. Independently of statute, such a mortgage, given for value and in good faith, may be valid without change of possession. *Conrad* v. *Atlantic Insurance Company*, 1 Pet., 449; *De Wolf* v. *Harris*, 4 Mason, 515; Notes to Twyne's case, Smith's Leading Cases, 1.

In the State of Massachusetts, since 1832, the statute has required possession to be taken and kept by the mortgagee, or a due record of the mortgage; and if neither is done, it shall not be valid "against any other person than the parties thereto." Gen. Sts., C. 151, Section 1. The Supreme Judicial Court of the Commonwealth have construed this language strictly, and have held that actual notice of the mortgage will not defeat the title of a purchaser. *Travis* v. *Bishop*, 13 Met., 304; and they had before intimated that probably an attaching

creditor, with actual notice, would hold his attachment against the mortgagee.

From these decisions and intimations, the step was easy to a ruling that an assignee in insolvency had a better title than such a mortgagee. *Bingham* v. *Jordan*, 1 Allen, 373. But before this case was decided, Judge Story had held a different rule in *Winsor* v. *McClellan*, 2 Story. His reasoning is, that the assignee, in the absence of fraud, in fact, represents the bankrupt, and takes only what he had, subject to all incumbrances and liens which are valid as against him, and that he is therefore fairly one of the parties within the statute. This decision does not appear to have been brought to the notice of the court, in the argument of *Bingham* v. *Jordan*; but the two cases are not necessarily opposed, because, by the insolvent law of the State, the assignee takes not only all the debtor's property, but all that could be taken on execution against him at the time of the insolvency; and under the earlier decisions and intimations, such chattels could have been taken by an execution creditor, even though he had actual notice of the mortgage. There was no such language in the Bankrupt Act of 1841, nor is there in that of 1867. I feel bound to follow the decision of the Circuit Court, which, besides, approves itself to my judgment, unless some distinction can be found between the two Bankrupt Acts, and I find no such distinction. The 14th Section gives to the assignee all the property and estate of the bankrupt, with certain exceptions, and authorizes him to redeem or discharge any mortgage, pledge, or lien, etc. It nowhere grants any goods that are not the bankrupt's, even if they should be in his possession, and it preserves all liens, except attachments. Much stress was laid upon the fact that in the same section it is provided that no mortgage of any vessel, or of any other goods or chattels, made as security for any debt or debts in good faith, and for present considerations, and otherwise valid and duly recorded, pursuant to any statute of the United States, or of any State, shall be invalidated or affected "hereby." But it does not seem to me that this proviso can enlarge the rights or title of the assignee, or can make

a mortgage invalid against him, which, but for the proviso, would have been valid. Suppose possession to have been taken and retained by the mortgagee, no record would be necessary; and the mortgagee's title would be good at common law, and by the statute; but the proviso, in terms, only saves mortgages that have been duly recorded, and not those which need no record. By the decision of Judge Story, this mortgage need not be recorded as against the assignee in bankruptcy, who is one of the parties thereto, in the sense of the law. The proviso appears to have been inserted out of greater caution, lest it should be supposed that valid chattel mortgages should be affected by the assignment, and not with any view of construing the laws regarding record; and so, if the mortgage be one that requires no record, as if it be executed in a State having no statute upon the subject; or if, as in this case, record is not required between the parties, the proviso will not defeat it. Take the very case of the mortgage of a vessel, mentioned in the act, such a mortgage is good without record against persons having notice of it; and I suppose it is not to be doubted that an assignee in bankruptcy takes as a purchaser with notice of all equities. It was said at the argument that the notes secured by the mortgage were more in amount than the whole proceeds, and that the mortgage had not in fact paid them. If this be so, the order should be that the assignees distribute the proceeds of the sale of the mortgaged property, *pro rata*, among the *bona fide* holders of the notes secured thereby, and that these holders have leave to prove for the balance only off their respective debts, after crediting the payments against the general assets of the estate. And even if there be enough to pay the secured debts in full, the assignees have a right to see that the money is so applied.

G. A. Somerby and *T. S. Dame*, for the mortgagee.

T. H. Sweetser and *T. F. Nutter*, for assignees.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Whether a married woman may prove against the estate of a bankrupt firm, of which her husband was a member, the amount of a promissory note given by the firm to him for his contribution to capital stock—the money having been furnished by her, and the note transferred to her soon after its execution,

Held, the note was not an evidence of debt against the firm, but against her husband only. She may prove as against her husband and participate in the dividends of his individual estate, but not against the partnership estate.

In re Richard H. Frost & Lewis Westfall.

At Detroit, in said district, on the 29th January, 1870. Before Mr. Hovey K. Clarke, Register in bankruptcy.

I, the said Register, do hereby certify that in the course of proceedings before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by counsel for the opposing parties, to wit: Mr. Lothrop, who appeared for Mrs. Sarah A. Frost, a creditor, who has heretofore filed proof of her claim against said estate, and Mr. Dickinson, who appears for creditors who object to the allowance of said claim, and on whose petition an order has been made for the examination, to wit:

Upon the facts shown by the proofs in this case, is the note presented by Mrs. Frost valid against the partnership in her hands, and entitled to be proven and allowed as a claim against the partnership assets?

And the parties requested that the same should be certified to the judge for his opinion thereon.

FACTS.

On the 1st of March, 1864, the bankrupts entered into partnership under written articles of that date, which partnership by its terms was to continue to the 1st of March, 1869. The articles also provided, that "The capital stock of said concern is to be thirteen thousand dollars, and is to be contributed as follows, to wit: R. H. Frost is to put in ten thousand five hundred dollars, and Lewis Westfall is to put in two thousand five hundred dollars, and the firm is to issue notes to the par-

ties for said capital, and pay annual interest on the same, at the rate of seven per cent. per annum; said capital stock is to be left in the concern until the expiration of the copartnership." The profits of the business were to be equally divided. A note was delivered to each partner in accordance with the articles—one to Frost for ten thousand five hundred dollars, and one to Westfall for two thousand five hundred dollars. The note given to Frost is the claim which Mrs. Frost seeks to prove against the estate of the bankrupts. The following is a copy of it:

$10,500. JACKSON, March 1, 1864.

One day after date we promise to pay to the order of R. H. Frost ten thousand five hundred dollars, with interest seven per cent., payable annually, value received.

(Signed) FROST & WESTFALL.

(Stamped.)

[Copy Indorsement.]

Pay Sarah A. Frost or order.

(Signed) R. A. FROST.

The testimony taken on the re-examination of the claim of Mrs. Frost, shows that for several years before the formation of the firm of Frost and Westfall, Mr. Frost, her husband, had been a member of the firm of Frost & Crittenden, the capital stock of which was composed in part of a sum or sums of money which Mrs. Frost has furnished her husband to put into the business. At the dissolution of the firm of Frost and Crittenden, Mrs. Frost held the note of that firm for money advanced by her and put into the business, for about the sum of six thousand dollars, which was taken to be the value of the property of Frost & Crittenden, which was transferred to the new firm of Frost & Westfall; that Mrs. Frost, about a month before this time, put into the hands of her husband to put into the business of the new firm, the further sum of four thousand dollars, which, with the six thousand dollars already mentioned, and perhaps some other items not specified, constituted the sum of ten thousand five hundred dollars, which Frost, by his

articles of partnership with Westfall was to contribute to the capital stock of the firm of Frost & Westfall, and for which the note presented in this case was given. The precise time when the note was delivered by Mr. Frost to his wife is not stated. Mrs. Frost says, it was "at the time or very soon after it was made." Mr. Frost says that he did not have the note "until the firm had been formed," and he thinks it "was written a few days after it was dated." The date was March 1, 1864—the date of the articles of copartnership.

OPINION OF THE REGISTER.

It is contended on behalf of Mrs. Frost that the note appended to her deposition is evidence of an indebtedness which existed on the day of its date from the firm of Frost & Westfall to R. H. Frost, one of its members, from whom she received it for an actual consideration paid to him equal to the full amount of the note, and it is claimed that a debt due by a firm to one of its members, when evidenced by a note and that note in the hands of a third person *bona fide*, may be proved against the firm in all respects like any other obligation of the firm.

The first inquiry is, was this in fact an indebtedness on the date of the note by the firm of Frost & Westfall to R. H. Frost? The articles of copartnership show that Frost & Westfall had agreed with each other to become partners, that Frost should pay into the common stock of the firm ten thousand five hundred dollars, and Westfall should pay two thousand five hundred dollars, and that these sums, when paid, should be "left in the concern until the expiration of the copartnership," which was to be five years thereafter. By this agreement Frost & Westfall were each the debtors of the firm until the sum to be contributed by each was paid. The payment of the sum, therefore, did not create a debt from Frost & Westfall to Frost; it simply discharged an obligation from Frost to Frost & Westfall, and the note which was given was simply the evidence of that fact, given in the form which the articles required. The note, construed with reference to these articles, had no

other legal effect than a receipt or certificate that the payee, R. H. Frost, held of the capital stock of the firm of Frost and Westfall twenty-one twenty-sixths of the whole. Westfall held a similar note representing five twenty-sixths of the stock. These notes were made payable one day after date. They were dated on the 1st of March, 1864, though written within, as Mr. Frost thinks, "a few days after." It cannot be possible that either of the partners supposed that these notes could properly be passed into the hands of a third party, and thus at any time enforced against the firm as negotiable promissory notes. To suppose this is to suppose that after having mutually agreed that the capital stock contributed by each should be "left in the concern until the expiration of the partnership," they should give each other notes by which either partner could, through the intervention of a third party, compel the surrender of the capital contributed by him at any time after four days, when the one day notes would mature, from the commencement of the five years of its proposed duration. If Mr. Frost delivered his note to his wife in order to enable her at her option to exercise any such power as this, it was in fraud of the rights of his partner, as well as against the creditors of the firm. If, however, he delivered the note to her as an evidence of his debt to her for money borrowed to "put into the business," as Mrs. Frost testifies it was, the delivery would probably operate as an equitable assignment of his interest in the firm to the extent that would be due upon it at the expiration of the copartnership. This would be a proper and legitimate use of it, but it would be no evidence of a debt against Frost & Westfall, and the attempt to employ it as such in this case is clearly against the rights of Westfall, and especially of the creditors of the firm.

There is, however, another inquiry necessary to a full consideration of the case—the claim being in the form of a negotiable promissory note, whether Mrs. Frost can claim the rights of a holder acquiring the note before maturity, and without notice of the equities affecting it. The proof is not clear whether she actually received it before or after maturity.

It had but four days to run, and it would seem probable from Mr. Frost's testimony, that it was past due before it was made and signed. The probability is therefore against her having received it before maturity. She testifies, however, to some knowledge as to the true character of the transaction out of which the note grew. She had lent money before to her husband to put into the business of Frost & Crittenden, and she lends this for the same purpose. Just what this meant or what was the effect of lending this money to her husband for this purpose, as related to her husband's partner and the creditors of the firm, she may not have known herself. The whole affair was managed by her husband, to arrange when, and as he saw fit; and it becomes a very serious question, whether a married woman may employ her husband to manage her individual estate, and not charge herself with notice of all facts known to him, which may affect his transactions on her behalf. The power of a married woman to deal directly with her own personal property in the manner shown by this case, is of recent origin; and the books afford but little light upon the extent to which her husband may, by his acts, affect her rights when dealing with her property. But when the confidential relation of husband and wife is considered, and especially the extent to which wives confide to their husbands the management of their estates, it is easy to see that the grossest abuses may arise if a wife be allowed to assert her right against her husband's creditors, on the ground of ignorance of facts which were well-known to him. I strongly incline to the opinion, that in all such cases the knowledge of the husband of the facts affecting the wife's property, which he is managing by her consent, must be regarded as the knowledge of the wife. In this case, Mrs. Frost knew what her husband was going to do with her money. She knew he was going to put it into his business with Westfall. He put it in as capital contributed by him. So Westfall understood it. She, I think, must be charged with the knowledge of the disposition her husband made of it, and though she may not know the difference between lending money to a firm and contributing a partner's share to the capital stock of the firm,

the law will determine her rights according to the facts, as they are shown to exist; and thus having knowledge, or being legally charged with the consequences of the knowledge, that the note she took was not evidence of a debt due from the firm of Frost & Westfall, she cannot be allowed to prove it against the partnership estate. As a debt against R. H. Frost, and entitled to participate in any dividend of the proceeds of his individual estate, I see no objection to its being allowed.

HOVEY K. CLARKE,
Register.

I fully concur in and approve of the foregoing views and conclusions of the Register.

JNO. W. LONGYEAR,
District Judge.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

Rule as to the legal rate of charges for printing advertisements of sale of real estate by order of the court.

In re WILLIAM DOWNING.

I, LUCIEN EATON, one of the Registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings:

To wit:

The assignee presented for my signature a check for one hundred and sixty-six dollars and fifty cents, in favor of Geo. Knapp & Co., for printing an advertisement of sale of real estate under the order of the court. The notice contained five and 15-100 folios each, and was printed thirty-six times. At the rate allowed by the statute of 26th February, 1853, this would amount to thirty-seven dollars.

The statute alluded to says, that printers shall be allowed "for publishing any * * notice * * required by * *

the lawful order of any court * * in any newspaper, forty cents per folio for the first insertion, and twenty cents for each subsequent insertion."

I am aware of no other statute in force on this subject. For the reason that it seemed plainly a case within the statute, I felt constrained to withhold my signature till the opinion of the court should be had, which I now request for my guidance.

LUCIEN EATON,
Register.

The computation is to be in accordance with the following rule:—

Each square of eight lines, first time.....$1 00
Each subsequent insertion, per square..... 50

SAMUEL TREAT,
Judge.

UNITED STATES DISTRICT COURT—N. D. OHIO.

A Bankrupt Court will recognize and give effect to all liens, whether national or State, except maritime liens, according to their priority of dates.
Under the Act of Congress of February, 1845, liens created by State statutes on vessels navigating the lakes were treated as *quasi* maritime liens.
By virtue of the late decision in the tug Eagle case, in the Supreme Court of the United States, and the prior decisions in 4 Wallace, they can no longer be treated as partaking of the character of maritime liens.
In the Bankrupt Court, mortgages on vessels, recorded under the Act of Congress of July, 1850, in the office of the Collector of Customs, in the home port, of a prior date, shall receive a preference over the domestic claims.

In re DWIGHT SCOTT.

SHERMAN, J.—In 1867, Dwight Scott was the sole owner of two propellers—the S. D. Caldwell and the Ironsides—and in the month of June, 1868, both vessels were libeled at Cleveland, for maritime debts that were liens. The vessels were sold by order of the District Court. Previous to their sale, Dwight Scott, the owner, filed his petition in the District Court, for the benefit of the Bankrupt Law, and was thereon

adjudged a bankrupt. The debts on which the propellers were libeled and sold were paid out of the proceeds of the sale, and the balance was paid to the assignee in bankruptcy. Motions were filed to distribute these proceeds among the different lien holders, according to their respective priorities, and upon these the court was called on to decide.

Upon the Bankrupt Law the court is bound to recognize and enforce all valid liens, and the estate of the bankrupt passes to the assignee subject to all liens that were subsisting upon it or its proceeds. The inquiry is therefore a proper one. What were the valid and subsisting liens, and their order, at the time the proceeds came into the hands of the assignee?

From the character of the claims presented, and the difficult questions of priority arising in the cases, on application of the parties the motions were referred to J. D. Cleveland, Esq., as special commissioner, to inquire into, and report upon the various claims and liens presented, and the order of their priority. The commissioner in the discharge of his duty made an able and elaborate report on the various questions submitted to him, which, from its fullness and general accuracy, has certainly entitled him to great credit.

The questions now before the court arise on exceptions to the finding and conclusions of the commissioner.

From that report and the proof it appears that the propellers Caldwell and Ironsides, one of eight hundred tons, and the other of twelve hundred tons, were both enrolled and licensed at the Custom-house of the Cuyahoga District, where Dwight Scott, the owner, resided, and were both engaged in commerce and navigation between Cleveland and other lake ports in different States, during the whole time between the accruing of the earliest lien and the time they were seized, libeled, and sold.

There were three classes of liens set up against the proceeds—

First. Strictly Maritime Liens, such as seamen's wages, materials, supplies, and repairs in ports of other States, for damages for collision, and for towage and wharfage in foreign ports. There was no question as to the validity and priority of

these liens, and under former orders of the court, they have been paid.

Second. STATUTORY LIENS—that is, claims for supplies, materials, etc., which the laws of Ohio declare shall be liens upon vessels navigating the waters in, or bordering upon the State, and that they shall at once attach upon the accruing of the debt.

Third. MORTGAGE LIENS. A mortgage on each propeller was given by Dwight Scott, the owner, in part, for the purchase-money, and the mortgages were duly recorded according to the requirements of the Act of Congress of July 29th, 1850, in the Custom-house of the District of Cuyahoga, the home port of the vessels.

The question presented is, as to the priority of the statutory liens, and the liens of the mortgages.

If the so-called water-craft laws of Ohio attached to these propellers, and had the force and effect that from their terms they were intended to have by the Legislature, then, unquestionably, the statutory liens will have the preference. Authorities are cited both in the Federal and State courts, to the effect that this class of liens should be recognized and declared valid, to take effect next after purely maritime liens. But, on an examination of these authorities, I am satisfied that these liens were so recognized by reason of the provisions of the Act of Congress of February, 1845, which reserved concurrent remedies, as given by the State laws, in proceedings against vessels navigating the western waters. Under that law, this class of claims was treated as a species of maritime liens, only inferior in their nature and precedence to liens allowed by the maritime law. Even the Supreme Court, about that time, under the power conferred upon it by Congress to prescribe forms and process, made the twelfth rule in admiralty, which provided that this class of claims, depending upon State statutes, might be enforced by proceedings *in rem* in the District Court, as a Court of Admiralty. This rule was, however, afterward repealed, but for reasons other than want of jurisdiction. 1 Black's Rep., 522.

Previous to the Act of 1845, the opinion was entertained and frequently asserted, that the admiralty jurisdiction of the Federal Courts did not extend beyond the ebb and flow of the tide, and, therefore, State laws and State courts governed and controlled all matters in controversy arising on the western lakes and rivers; 10 Wheaton, 428; 11 Peters, 1756; How., 344. In view of the vast and rapid increase of commerce on those waters, the Act of 1845 was passed, conferring admiralty jurisdiction on the District Court, as to claims against vessels navigating the lakes and waters connecting them, saving, however, to the parties, whatever concurrent remedy the common law might give them, and also such remedies as may be given by the laws of the States. Under this law, and with the ideas then universally prevailing, the doctrine grew up, that the State laws could create and establish liens upon that description of property. However, as time progressed, and the want of uniformity and consistency in the State laws became manifest, the subject of jurisdiction over vessels navigating the lakes received more attention, and was more closely investigated. From the time of the *Genesee Chief* case, 12 How., 459, down to the cases of the *Moses Taylor* and the *Hine & Trevor*, 4 Wallace, and the *Belfast*, 7 Wallace, the opinion has been growing that the District Court did not derive its admiralty jurisdiction over the western waters by reason of the Act of 1845, but that it was always possessed under the 9th Section of the Judiciary Act of 1789. Finally these doubts and opinions were settled at the late session of the Supreme Court, by a decision pronounced by Judge Nelson in the case of the *Tug Eagle* v. *Brig General Worth*, to the effect that the Act of 1845 was obsolete and of no effect, and that general jurisdiction in admiralty upon the lake was conferred upon the District Courts by the Judiciary Act of 1789. 2 Chicago Legal News, 205.

It follows, as the result of that decision, that if admiralty jurisdiction was conferred upon the District Courts by the original Judiciary Act, it is an exclusive jurisdiction, and that the State laws cannot create, upon property that is subject ex-

clusively to admiralty laws, charges and incumbrances that in any way partake of the character and force of maritime liens, that might be superior to other charge or incumbrance of an older date. This opinion, so well considered, and so much in harmony as it is with the rulings of all the District Courts along the lakes for years past, is decisive of the nature and character of these claims, and the force, and priority, and effect, that will hereafter be given them in the courts.

In this connection I may cite the decision of the Supreme Court of Ohio, in a very late case, of the steamboat *General Buell* v. *Long*, 18 Ohio S. Rep., 521, recognizing the principles laid down in the *Moses Taylor* and the *Belfast* cases, and adopting them as the latest and most authoritative law on this subject. Similar cases involving similar principles have lately been decided in New York, 36 Tiffany, 19; in Minnesota, 12 Min. Rep., 565; in Indiana, 28 Ind. Rep., 341; and in Kentucky, 3 Bush. Rep., 438.

The Judiciary Act of 1789 saves to the parties all the concurrent remedies of the common law. The lien, that the statutes of Ohio declare that these domestic claims shall have, is not a common law lien or remedy. It is the creation of the statutes. The State of Ohio, as between her own citizens, and upon property within her jurisdiction, has the authority to declare what claims or indebtedness shall or shall not be liens, and the force and effect of those liens upon property. She has by her statutes declared that the class of claims now in question shall be liens, and shall at once attach upon the property, at the time of the creation of the debt. This court, as a Bankrupt Court, recognizes these statutes, and would be governed by them as far as possible in the distribution of the proceeds of property sold, and in the hands of an assignee. And if the question before the court was, whether these claims had a preference over a mortgage of a prior date, executed and recorded according to the laws of Ohio, or over any other debt against Dwight Scott, the bankrupt, even if it were in judgment and execution levied on the propellers previous to the accruing of their claims, the court

might order the payment of them out of their proceeds, before the mortgage and judgment were paid. It would do so, if the statute or the decisions under it had made them the first lien, for the State has full authority to discriminate by law, and create preferable liens upon property, so far as these liens are created or given validity to by the State legislation. But the mortgages on these propellers were of prior date to any of these domestic claims. They are both dated and recorded in April, 1867. The claims bear date at different times from May, 1867, to May, 1868. The mortgages are both recorded in pursuance of the Act of Congress of July 29, 1850, which provides substantially, that no mortgage of a vessel shall be valid against any person, except the mortgagor and his representatives, unless such mortgage shall be recorded in the office of the Collector of Customs, in the district where the vessel is registered or enrolled. By virtue of the mortgage, the mortgagees acquired a lien on the vessels to the amount named in them, and by the recording of them, they gave notice to the world, including these claimants, that such a lien existed. The mortgages are no more a maritime lien than these domestic claims are, of equal validity, and both were a charge and lien upon the propellers, to be paid according to their priority of date. If the claims had been of a prior date to the mortgages, they would have had a preference, and been paid first out of the proceeds of the sale, but as they happen to be of subsequent date, they must give way to the mortgages.

That Congress has the power to give validity to mortgages on vessels by authorizing their record in the office of the Collectors of the Customs in the home port, has been repeatedly settled. Under the power given in the Constitution to regulate commerce, Congress having created, as it were, this species of property and conferred upon it its chief value, there can be no reason but that power may be extended to the security and protection of the rights and title of all persons dealing therein. (1 Clifford, 463; 7 Wallace, 646.)

The conclusion I have arrived at may seem to be in conflict with the decisions in 14 Ohio Reps., 72, and 17 Ohio Reps.,

359, wherein it is held that the claims of creditors for supplies and materials to a vessel are, under the water-craft laws of Ohio, to be preferred as against a mortgage. These decisions were made in 1848, and previous to the act of Congress of July, 1850, and the question in those cases was between the domestic lien holders and a mortgage executed and recorded under the State statutes. It was therefore a different question from the one presented in this case, and, in view of their late decision in the case of the steamboat *Gen. Buell*, there can be no doubt but that courts would arrive at the same conclusion I have done.

Let an order be entered and distribution made according to the principles herein laid down.

Willey & Carey, for the mortgagees.

R. P. Ranney, S. Williamson, Backus, Estop & Burke, J. T. Carran, S. O. Griswold, and *Wyman*, for the claimants under the water-craft laws.

The decision in this case involves a fund of about thirty thousand dollars.

UNITED STATES CIRCUIT COURT—DISTRICT OF MISSOURI.

1. Where a partnership has been dissolved, and one of the copartners purchases *all* of the assets of the firm and agrees to pay all of the debts, and both partners subsequently become bankrupt and are individually put into bankruptcy, so that there is no solvent partner and no firm property, *Held*, under the Bankrupt Act of 1867, that the creditors of the firm, as well as the individual creditors of the partner who assumed to pay the firm debts, were entitled to share, *pari passu*, in the estate of such partner.
2. Under the Bankrupt Act (Section 36), assets are to be marshaled between the firm creditors and the separate creditors of the partners only when there are firm and separate assets, and proceedings are instituted against the firm and the individual members, as provided in that section.

In re William Downing.

The facts in the case, which were agreed to by the respective counsel, show that the bankrupt, William Downing, and one Richard W. Emerson, were copartners under the firm name of Downing & Emerson, and, as such, were dealers in boots and shoes in the city of St. Louis, previous to December, 1868; that

in the month of December, 1868, they dissolved by consent, Downing purchasing the stock of goods *and all other assets* of the firm, and agreeing *to pay off and discharge all* of its liabilities, and executing and delivering to Emerson for his (Emerson's) supposed interest in the concern, his notes, amounting to about forty thousand dollars; that said firm was then largely indebted and actually insolvent; that, after the dissolution of said firm, Downing continued in his individual name, and for his individual account, to prosecute the business at the same place until the 16th day of August, 1869; that while so doing business alone, Downing, in the regular course of business, disposed of part of said stock of goods, added to it by further purchases, paid off some of the liabilities of the old firm, and contracted further liabilities and debts in his own name alone; that on the 16th day of August, 1869, Downing executed a conveyance or assignment of all his assets, including the assets which came from the firm of Downing & Emerson, to John W. Kennan, as trustee, for the equal benefit of all his individual creditors and the creditors of said firm; that the trustee (Kennan) thereafter disposed of the stock of goods, realizing about sixty thousand dollars for it, and, when he had done so, Downing was proceeded against and adjudicated a bankrupt by the said District Court, and that, thereafter, said Kennan paid over to the said assignee in bankruptcy, John A. Allen, the whole of the proceeds of the sale of said stock of goods; that the copartnership of Downing & Emerson was never adjudicated bankrupt as such, nor have the persons holding claims against it released Emerson from liability on such claims, but that Emerson has also been adjudicated a bankrupt in the State of Massachusetts; that claims against the bankrupt Downing individ ually, as well as claims against him as one of the said copartnership of Downing & Emerson, have been proven and allowed against his estate without any distinction, except so far as the evidences of debt upon which the proofs were made would show any, and that all these creditors voted for the said assignee; that, before he was adjudicated a bankrupt, and after the 16th of August, 1869, Downing executed and delivered to each one

of the creditors of Downing & Emerson an agreement in the following form:

"Whereas, the firm of Downing & Emerson, which was composed of William Downing and Richard W. Emerson, was, in the month of December, A. D. eighteen hundred and sixty-eight, dissolved; and whereas, said Emerson assigned to said Downing all his, said Emerson's, interest in the property and assets of said firm, and said Downing, in consideration thereof, gave said Emerson certain promissory notes, and agreed to assume and pay all the liabilities and debts of said firm of Downing & Emerson, and hold said Emerson harmless from the same, and I have agreed to pay the debts and liabilities of said firm as my own private, individual debts, and the party with whom this agreement is made may now have debts and claims against said firm; now, therefore, I, the said Downing, for value received by me of ———, the receipt whereof is hereby acknowledged, do hereby covenant and agree with said ———, that I, individually, will pay as my own private and individual debts, all and singular the debts, liabilities, and claims against said firm of Downing & Emerson, held by said ———. Witness my hand and seal, this —— day of September, 1869."

At a meeting of the creditors of said William Downing called by and held before Register Eaton, for the purpose of distributing the said sixty thousand dollars, some of the individual creditors of Downing, who became such creditors after the dissolution of the firm of Downing & Emerson, filed a motion insisting that they and other individual creditors of Downing, were alone entitled to share in the distribution of said fund, while, on the other hand, those of the creditors who held claims against Downing & Emerson, made the same claim. Then the question arose as to how the distribution should be made, and that is the question certified. The District Judge gave the following opinion or decision: "Upon the facts submitted, the court rules that the separate creditors of the bankrupt must be first paid in full before the partnership creditors can receive any dividend from the funds in the hands of the assignee."

To this decision and ruling the assignee excepted and prosecuted this appeal. It was also admitted in the argument in the District Court, that Downing was adjudicated a bankrupt upon the petition of an individual creditor.

Hitchcock & Lubke, for appellant.

Sharp & Broadhead, for appellee.

OPINION OF JUDGE DILLON.

The court finds this to be a very difficult case. The difficulty arises rather from the state of the authorities, all of which have been brought to our attention by the industry of counsel, than from any doubt in the mind of the court as to how it ought, on principle, to be decided. As an early determination is desired, we shall refrain from an extended examination of the cases cited, or elaborate exposition of our views, and content ourselves with indicating briefly the grounds of our judgment.

On either of two grounds the order appealed from is, in our opinion, erroneous.

First. This is a contest between the individual creditors of Downing, and those who became the creditors of the firm of Downing & Emerson before its dissolution. It is admitted that Downing purchased of Emerson all "the goods and assets of the firm." There is no joint property. Emerson is a non-resident of this State, and is also insolvent and in bankruptcy. The ground on which the individual creditors claim priority is that, by the sale from Emerson to Downing, the property became the individual property of the latter, and that upon the well-known equity rule, recognized, as it is claimed, by the Bankrupt Act (Section 36), they, as the individual creditors of the bankrupt, are entitled to be paid out of his separate estate in preference to the firm creditors.

This rule, upon the agreed statement, has no application to the case. Downing, when he purchased the assets from Emerson, agreed with the latter "to pay off and discharge all the liabilities" of the firm. This contract was binding on Downing, and so far as he is concerned made these debts his own. As between Downing and Emerson, the former became the

sole and individual creditor. As between Downing and the creditors, the latter had the legal right, if they deemed it to be for their interest, to treat Downing as individually liable to them on his promise to Emerson for their benefit. In equity, the promise which Downing made to Emerson to pay these debts could be enforced against him; and this controversy is to be decided upon equitable principles. Indeed, a promise by one to another for the benefit of a third person may, according to the prevailing American doctrine, be enforced at law in the name of the latter, especially where, as in the case at bar, the promisor receives a fund or property with which to make such payment.

"In this country," says Mr. Parsons, "the right of a third party to bring an action on a promise made to another for his benefit seems to be somewhat more positively asserted, and we think it would be safe to consider this the prevailing rule with us; indeed, it has been held that such a promise is to be deemed made with a third party, if adopted by him, though he was not cognizant of it when made." (1 Parsons' Cont., 467, 468, 5th ed., and cases cited.)

"After some conflict of opinion, it seems now to be settled in cases of simple contract, that if one person makes a promise to another for the benefit of a third, the latter may maintain an action upon it, though the consideration did not move from him." (2 Greenl. Ev., Section 109, and cases there cited.)

That Downing received in the surrender to him of the assets, a sufficient consideration for his promise, cannot be disputed.

By this promise he is bound, and the creditors of the firm are in equity entitled to enforce it against him. It is, on their election to avail themselves of it, cumulative to their other rights. They need not release the firm in order to be able to get the benefit of this promise, made by one of its members, for their benefit. If Downing had secured this promise by mortgage, can it be doubted that equity (aside from the bankruptcy) would give the creditors the benefit of this security if they desired it? The right of the creditors given by the arrangement between Downing and Emerson, is not defeated by

the subsequent bankruptcy of Downing. They may assent to and claim the benefit of it at any time, either before or after bankruptcy of their debtor.

I look upon their rights in equity as being the same as if Downing had individually indorsed the pre-existing firm paper, in which case they could have proved their debt against either, if not indeed against both the firm and Downing.

It would be strange if the partners could, by the same transaction, make the assets individual property, but could not with the assent of the creditors make one of the firm debtors also individually liable. It carries out the contract precisely to hold that the parties made the property the individual property of Downing, and that the latter superadded to the existing liability to the creditors, his individual liability.

Second. But if the foregoing views should be erroneous, I am of opinion that the same result is reached by the true construction of the Bankrupt Act of 1867.

In the case at bar, it will be remembered, the partnership had ceased to exist. There were no firm assets. Both of the members of the firm were separately in bankruptcy and insolvent. Under these circumstances, the creditors of the former firm of Downing & Emerson had, under Section 19 of the Bankrupt Act, a right to prove their debts against the estate of Downing—especially as he had, for a valuable consideration, assumed to pay them. If no proceedings are taken against the partnership, under Section 36 of the Bankrupt Act (which contemplates cases where there are both firm and individual assets and debts), firm debts may, as stated, be proved under Section 19; are entitled to share *pro rata* under Section 27, as it extends to "all creditors whose debts are duly proved;" and are embraced in the discharge provided for in Sections 32, 33, and 34. These sections provided for a discharge from "*all* debts and claims;" and the use of the word "partner" in Section 33 shows that it was contemplated that one partner might, under the antecedent provisions of the act, be entitled to be discharged for or in respect of partnership debts.

In other words, Section 36 of the Bankrupt Act only comes

into operation when there are firm assets and the proceedings are instituted against the firm and each of its members, in which case the assets are to be marshaled according to the equity rule, firm creditors to have priority as respects the joint assets, and individual creditors as respects the separate estate of his debtor.

This construction of the Bankrupt Act has the merit of producing that equality, which it is the leading and manifest purpose of the act to secure; and in effect reaches the result which the English chancellors have felt bound by equitable principles to adopt, viz.: That where there is no joint estate and no solvent partner, all the creditors, joint and separate, shall share, *pari passu*, in the estate of the bankrupt partner.

Upon the facts submitted, this court is of the opinion that all the creditors of the said bankrupt who had proved their claims before the Register, were and are entitled to share, *pro rata*, in the distribution of the estate of the bankrupt, whether their debts were originally against the firm of Downing & Emerson or against the said Downing individually. This court is therefore of the opinion that the court below erred in holding that the individual creditors of Downing were entitled to priority, and its judgment is reversed, and the assignee ordered to make an equal distribution of the estate among all the creditors whose claims have been duly established and registered.

Judge Krekel concurs.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where a creditor, who is also the assignee in bankruptcy, having employed counsel in proceedings before the adjudication, asks Register for an order for payment of the same by him, as assignee, in the ordinary distribution of bankrupt's estate,

Held, the Register cannot entertain the application in the first instance. There must be a petition to the court by the party, setting out the facts and asking the relief desired.

In re HENRY E. DIBBLEE, JOHN J. KRAUSS AND DAVID P. BINGLEY.

I, THE undersigned, one of the Registers in bankruptcy, do

hereby certify to this Honorable Court, that James R. Clark, Jr., through his counsel, Charles H. Smith, Esq., presents a claim of his firm of Garrett, Clark & Co., against the estate of the bankrupts, for sums of money paid or incurred by them for services of counsel in proceedings had by them as petitioning creditors of the said bankrupts before the adjudication; and asks me to specify such sum as upon the final auditing and passing of his accounts, as assignee, may be allowed therefor, and make an order of distribution for the payment of the same--according to the custom and practice in cases of distribution by him in the ordinary discharge of his duties as assignee. He cites a decision of the Circuit Court in the case of the New York Mail Steamship Company—a manuscript copy of which, furnished me by Mr. Smith, I annex hereto (*a*). It appears from the decision, that the claim is one that the law recognizes, and which is an equitable lien upon the estate or funds in the hands of the assignee—and if so, it would seem right that the assignee should pay it, or such sum as may be just and reasonable, from such funds. The question, however, that presents itself is, whether this claim is not one strictly within the equity jurisdiction of this court, to be passed upon in each case by the court, and then sent down to the Register to ascertain what would be a reasonable sum, and order distribution accordingly.

I think this court has favored a practice in harmony with the suggestion, and that the practice of filing a petition, on the part of the creditors, and obtaining an order of reference, has, in similar cases, prevailed.

I am more reluctant to act in this case without a special order, as the petitioning creditor and the assignee are the same person. In such case, it is, no doubt, the duty of the Register to act with caution, and perhaps not without notice to other creditors.

All of which is respectfully submitted.

I. T. Williams, *Register.*

Blatchford, J.—The Register cannot entertain the applica-

tion in the first instance. There must be a petition to the court by the party, setting out the facts and asking the relief desired.

(*a*). *In re The New York Mail Steamship Company.*

WOODRUFF, C. J.—The petition of the National Bank of Commonwealth in this proceeding, being presented to the District Court of this district, and the District Judge, as a stockholder in the said bank, being concerned in interest, the proceeding has been certified to this court, pursuant to Section 11 of the Act of May 8th, 1792. 1 Stat., 279. This petitioner was the petitioning creditor upon whose application the above-named debtor was decreed bankrupt, in which proceeding the property of the debtor was protected for the benefit of creditors; an adjudication, declaring the debtor bankrupt, was had, an assignee appointed, and a large amount of property came to, and is now in the hands of, such assignee, subject to distribution to creditors. For the institution and conduct of those proceedings, the petitioning creditor was obliged and did employ counsel, and incurred the expense of such employment, and the amount of such expense is shown to have been reasonable. And such petitioning creditor now asks, in substance, that in making distribution of the funds in the hands of the assignee, this expense, incurred for the common benefit, shall be charged on the fund, so that practically the creditors who come in to share the benefit of the decree in bankruptcy, and the fruits thereof, may share also in the said expense of procuring them. The mere statement of the application shows the eminent justice and equity of the relief sought. No reason can possibly be suggested why these petitioning creditors should pay these expenses, without chance of reimbursement, and thereby, to this extent, lose (for the greater advantage of other creditors) the benefit of the proceeding. Independently of any adjudications already had upon the subject, I should say that the principles governing courts of equity, in dealing with a fund brought within its jurisdiction, for the purpose of distribution—or in lending its advisory aid,

for the purpose of guiding or controlling its administration—sanction the allowance of this expense, and there, as well as in proceedings in bankruptcy, the ordinary fee bill, providing for taxable costs, does not provide for it. I concur in the conclusion of several of the District Judges who have passed upon this question, and the sanction of those decisions by Chief Justice Chase renders extended discussion unnecessary. *In re* Williams, 2 N. B. R., 83; *in re* Waite and Crocker, 2 N. B. R., 452; *in re* Schwab, 2 N. B. R., *octavo*, 488; *ex parte* Platt, 2 Wall, 353; *in re* Mittledorfer, 3 N. B. R., 1. Such allowances should be guarded by the most cautious regard for the rights and interests of the creditors at large, lest, under the form of necessary expenses, undue liberality to counsel should be sanctioned, in reduction of the fund; and if there was any suggestion in this case that the charge was in any degree unreasonable, I should deem it proper, by reference or otherwise, to cause further inquiry to be made.

Let an order be entered directing the allowance to the petitioning creditors of the expense of counsel, as prayed for.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where an action had been commenced in the Superior Court of Connecticut against a firm doing business in New York, attachment laid, judgment recovered, and execution issued, without the consent or privity of said firm, in part for money loaned, and the balance upon promissory notes for money loaned, a portion of which (about fifteen thousand dollars) fell due subsequent to the commencement of said action,

Q. 1. Is it lawful for the plaintiff to continue his action in said Superior Court for the purpose of condemning the property attached, and for perfecting his lien thereon—or is it the duty of plaintiff to discontinue said action?

2. Is it the duty of the plaintiff to release said lands from the lien of said attachment?

3. Ought plaintiff to amend his deposition for proof of debt, and, if so, in what manner?

4. Ought the real estate attached to be sold subject to the lien thereon, and, if so, in what manner?

***Held,* the questions are not certified by the Register as being upon any**

point or matter which has arisen in the course of proceedings before him, and are not within the first subdivision of Section 6.

In re BRONSON PECK.

I, ISAAC DAYTON, one of the Registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions arose pertinent to said proceedings, and were, by Charles N. Judson, Esq., attorney and counsel for John J. Cisco, one of the creditors of said bankrupt, stated for the opinion of the court thereon.

The facts, as submitted to me, are as follows:

On the 10th day of June, 1868, John J. Cisco, of the city of New York, commenced an action in the Superior Court of the State of Connecticut against Bronson Peck, then doing business in said city of New York, under the firm name of Bronson Peck & Co.; and on the 11th day of June, 1868, attached certain lands situated at Greenwich, in the State of Connecticut, valued at less than fifteen thousand dollars, as the property of said Bronson Peck. That said Bronson Peck had, for ten years prior to the commencement of said action, carried on business in said city of New York, either in his own name, or under the firm name of Bronson Peck & Co.; and that at the time of the commencement of said action, said John J. Cisco was aware that said Bronson Peck and said Bronson Peck & Co. were in an embarrassed condition in their business matters.

That in October, 1868, said John J. Cisco recovered judgment in said action by default against said Bronson Peck for the sum of forty-three thousand eight hundred and ninety-eight dollars and four cents, or thereabouts; and thereupon, to wit, on the 15th day of October, 1868, the aforesaid lands were set off, in accordance with the laws of the State of Connecticut, on execution issued upon said judgment against said Bronson Peck, at a valuation of seven thousand two hundred and twenty-five dollars. The sheriff's fees on said execution being the sum of one hundred and fifty-five dollars and seventy-two cents.

That said action was commenced, said attachment was laid,

said judgment was recovered, and said set-off was made, without the consent or privity of said Bronson Peck, or said Bronson Peck & Co., and without any collusion or connivance on his or their part.

That the debt for which said judgment was recovered, and the lands set off as aforesaid, was in part for money loaned said Bronson Peck, or said Bronson Peck & Co., and the balance upon promissory notes given for money loaned said Bronson Peck, or said Bronson Peck & Co., a portion of which latter, to wit, of the sum of fifteen thousand dollars, or thereabouts, fell due subsequent to the commencement of said action, but prior to October 1st, 1868.

That at the commencement of the December term, in the year 1868, of said Superior Court of Connecticut, a motion was made in behalf of said Bronson Peck to open said judgment, and to permit said Peck to defend said action, and afterwards, to wit, on or about the 1st day of March, 1869, said judgment was opened, vacated, and set aside upon condition of trial upon the merits, and no plea in abatement to be filed or received.

And that said action is now upon the calendar of said Superior Court, waiting to be tried, but the trial thereof is delayed by injunctions from said Superior Court, obtained by said Bronson Peck, or by his assignee in bankruptcy, John Todd; and that the attachment on said land is still undischarged of record. That on the 31st day of December, 1868, and more than six months after the commencement of the action as before set forth, said Bronson Peck filed his petition in this court to be declared a bankrupt, and thereafter, on said petition, was duly declared a bankrupt, and on the 2d day of March, 1869, John Todd was appointed assignee of the effects and estate of said bankrupt; and on the 13th day of March, 1869, said assignment was duly recorded in the record office of the town of Greenwich, State of Connecticut aforesaid.

That on or about the 16th day of February, 1869, and prior to the decision of the motion to open said judgment, as hereinbefore set forth, said John J. Cisco made and filed with the

Register in charge of said bankruptcy, his deposition for proof of debt without security, alleging therein, "That Bronson Peck, the said bankrupt, is justly and truly indebted to him in the sum of thirty-six thousand eight hundred and twenty-eight dollars and seventy-six cents, and interest from October 15, 1868, being the amount unpaid of a judgment obtained in the Superior Court of the State of Connecticut, by him against the said bankrupt, said judgment so recovered being for the sum of forty-four thousand and fifty-three dollars and seventy-six cents, recovered October 15, 1868, of which the sum of seven thousand two hundred and twenty-five dollars was paid upon an execution issued upon said judgment."

That said amount so alleged to be due included the amount of the sheriff's fees on execution in the set-off as aforesaid; and that said proof of debt was made in good faith, and in the belief that the recovery of the judgment and the set-off of the lands aforesaid were valid and legal proceedings under the laws of the State of Connecticut.

That on the 4th day of January, 1870, said Bronson Peck received from the District Court of the Southern District of New York a discharge from all his debts.

That said John J. Cisco has offered to have the value of said real estate ascertained by agreement with said assignee, or to have the same sold subject to his lien, if any he may have thereon, and to have his deposition for proof of debt amended in accordance with the facts hereinbefore set forth, but said assignee has refused to assent thereto.

That in accordance with the first division of the 6th Section of the act entitled, "An Act to establish a uniform system of bankruptcy throughout the United States," the said John J. Cisco asks the opinion of the court as to his duty in the premises.

The question of law submitted for the opinion of the court is as follows:

First. Is it lawful for said John J. Cisco to continue his said action in said Superior Court for the purpose of condemning the property attached as aforesaid, and for the purpose of

perfecting his lien thereon, or is it the duty of said Cisco to discontinue said action?

Second. Is it the duty of said John J. Cisco to release said lands from the lien of said attachment?

Third. Ought the said John J. Cisco to amend his deposition for proof of debt, and, if so, in what manner?

Fourth. Ought the real estate attached as aforesaid to be sold subject to the lien of said John J. Cisco thereon, and, if so, in what manner?

JOHN J. CISCO,
by Charles N. Judson, his attorney,
167 Broadway, N. Y.

Dated April 26, 1870.

ISAAC DAYTON, *Register.*

BLATCHFORD, J.—The within questions are not upon any point or matter which has arisen in the course of any proceedings before the Register, and are not so certified by the Register. They are, therefore, not within the first subdivision of Section 6.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where bankrupt prays that he may be discharged from his debts under the provisions of Section 29, and is opposed by counsel for creditors,

Held, the order of reference and the order to show cause were regular, and the order to show cause ought not to be discharged on the ground stated.

In re ANDREW J. SOLIS.

THE undersigned, Register in Bankruptcy for the Southern District of New York, in charge of the proceedings in this bankruptcy, to whom, by an order of this court, made in this bankruptcy, upon the petition of Andrew J. Solis, the bankrupt above named, on the 26th day of March, in the year 1870, it was referred to make an order to show cause upon the said petition, and to sit in chambers on the return of the said order, and to pass the last examination of the bankrupt if there be no opposition, hereby certifies to the honorable the District

Court of the United States for the Southern District of New York :

That, pursuant to the said order of reference, an order of this court was made and entered in this bankruptcy on the 26th day of March, 1870, providing that all creditors who had proved their debts, and other persons in interest, might appear on the 21st day of April, 1870, before this court at chambers, before the undersigned, at his office, and show cause, if any they had, why a discharge should not be granted to the bankrupt.

That on the said 21st day of April, 1870, the undersigned was attended upon the said reference and order in the said bankruptcy by Andrew J. Solis, the bankrupt, by Mr. George D. F. Lord, his counsel ; Manning & DeForest, creditors of the bankrupt, by Mr. Robert Sewell, their counsel.

That by consent the hearing of the application of the bankrupt to be discharged from his debts, and all proceedings upon the said order to show cause why a discharge should not be granted to the bankrupt, were adjourned to Friday, the 22d day of April, 1870, at 11 o'clock in the forenoon, at the office of the undersigned, reserving to every creditor on such adjourned day, every right which he had on this day, and as if an adjournment had not been had.

That on the said 22d day of April, 1870, the undersigned was attended on the said reference and order by Andrew J. Solis, the bankrupt, in person, and by Mr. Daniel Lord, and Mr. George D. F. Lord, his counsel ; Manning & DeForest, creditors of the bankrupt, by Mr. Robert Sewell, their counsel ; James S. Hollinshead, The Phœnix Insurance Company, The Insurance Company of North America, The Putnam Fire Insurance Company, and the Insurance Company of the State of Pennsylvania, creditors of the bankrupt, by Mr. Nathaniel Hoxie, their counsel.

On behalf of the creditors thus attending before the undersigned, it was objected that the order of reference aforesaid to the undersigned to make the order to show cause aforesaid, and the said order to show cause so as aforesaid made by the

undersigned, had been irregularly made, because assets had come to the hands of the assignee in bankruptcy of the estate and effects of the bankrupt, and six months had not elapsed from the adjudication of bankruptcy. In support of this objection, the creditors, by their counsel, read the pages, a copy of which is hereto annexed from Schedule "B," annexed to the first petition of the bankrupt in this proceeding.

The undersigned stated his opinion that the order of reference and the order to show cause would not be set aside on the ground of irregularity.

The said creditors then filed with the undersigned the copy hereto annexed of the sworn petition of Manning & DeForest, the said creditors of the said bankrupt, and the deposition attached to the same and thereto annexed, of Robert Sewell, Esq., counsel as aforesaid of the said creditors, and again read the portion aforesaid, a copy of which is hereto annexed of Schedule "B," annexed to the first petition of the bankrupt in this bankruptcy.

The bankrupt then filed with the undersigned the return hereto annexed of the assignee in bankruptcy, of the estate and effects of the bankrupt, and the deposition hereto annexed of Andrew J. Solis, the said bankrupt.

The counsel for the creditors claimed that the order of reference aforesaid to the undersigned to make the order aforesaid to show cause, and the said order to show cause, ought to be discharged on the ground that at the time of the application of the bankrupt for a discharge from his debts, six months from the adjudication of bankruptcy of the bankrupt had not expired.

The questions whether the order of reference aforesaid to the undersigned to make the order to show cause aforesaid, and the said order to show cause were irregular, and whether the said order of reference and the said order to show cause ought to be discharged on the ground that six months from the adjudication of bankruptcy of the bankrupt had not expired, are, at the request of the parties, certified to the judge for his opinion thereon.

Dated at the city of New York, the 22d day of April, 1870.

ISAAC DAYTON, *Register.*

OPINION OF THE REGISTER.

The petition of the bankrupt of the 26th of March, 1870, praying that he may be decreed to have a discharge from his debts, alleged that no assets had come to the hands of the assignee of his estate. No objection is made that this petition was not under oath. The allegation brought the case within the provision of the 29th Section of the act, that "if no assets have come to the hands of the assignee at any time after the expiration of sixty days from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts," and gave the court jurisdiction to make the order of reference, and an order to show cause. *In re* Bellamy, 1 N. B. R., 64, sup. xiv.

Those orders were therefore not irregular. Nor should those orders be set aside upon the facts. Certificates of stocks or claims against debtors of the bankrupt which, up to the time of the application of the bankrupt for discharge, have not actually produced anything; and for which the only offer made is an offer of a small sum of money, whilst there is strong evidence that these stocks and claims are absolutely worthless; may very justly be said not to be assets at the time of the application for discharge, whatever they may become afterwards. The bankrupt was therefore entitled to make his application for discharge at the expiration of sixty days from the adjudication of bankruptcy.

I. DAYTON, *Register.*

BLATCHFORD, J.—The order of reference and the order to show cause were regular, and the order to show cause ought not to be discharged on the ground stated. I concur in the views stated by the Register in his opinion.

UNITED STATES DISTRICT COURT—MAINE.

That portion of the law of Maine relative to the sale of intoxicating liquors, which debars a creditor from maintaining a suit for liquors purchased without the State, with intent to sell the same in violation of the provisions of said act, does not prevent proof of such claim in bankruptcy against the estate of a bankrupt residing in said State, if such contract is valid at the place where made.

In re MURRAY.

Fox, J.—This is an appeal from the allowance by the Register of a claim against the estate of the bankrupt, in favor of W. E. Booraem, a citizen of New York, for the sum of three hundred and sixty-three dollars and forty-five cents. It is submitted for decision upon an agreed statement of facts, from which it appears that the bankrupt was an apothecary, carrying on business at Portland; that from time to time he sent orders to Booraem at New York, for spirituous liquors, to be forwarded by steamer to the bankrupt at Portland, by him to be here sold, in violation of the laws of Maine. The claim, as proved and allowed, is for the price of these liquors. It is further agreed, that Booraem did not know that the liquors were to be sold contrary to the laws of Maine, and that by the laws of New York the contract and claim were legal, and could be there enforced.

The bankrupt having ordered these goods to be sent to him from New York by the carrier, a delivery of them to the carrier for his use, was a delivery to him, and the sale and purchase must be considered as made and completed in New York, and the case finds that such a sale there was legal, and that the price of the articles so sold could, in the courts of that State, be recovered of the purchaser.

It is, however, claimed by the assignee, that a recovery could not be had in the courts of this State for liquors so sold, and the case of *Messervey* v. *Gray*, 55 Me., 542, is relied on by him as sustaining this position, and it is true, that in that case it was decided "that when contracts made in other States are designed or calculated to aid in violating the laws of the State where they

are attempted to be enforced, the courts of the latter State are not obliged to furnish a remedy," and that under the Act of 1858, which declares "that no action shall be maintained for intoxicating liquors purchased out of the State, with intention to sell the same, or any part thereof, in violation of said act," a party selling liquors in New York, to a citizen of Maine, was not permitted to recover for the price of the liquors, although he had no knowledge of the purchaser's intention to sell the liquors in this State in violation of the law.

So long as the Act of 1858 shall continue in force, it may be that the courts of Maine will be justified in denying to the citizens of other States any redress on contracts of this nature, although the same shall be perfectly legal and valid by the laws of the State in which the contract is made, but the question still remains, whether the Federal Courts in this State are bound by this act and this decision of the State court, and are at liberty to refuse all remedies to a suitor, because he may be thus debarred of his remedy in the courts of this State? The remedy here sought is one provided by the Bankrupt Act, is under a law of Congress, and in one of the courts of the United States, and by a citizen of another State, against the estate of a citizen of this State. The Bankrupt Act declares "that all debts due and payable by the bankrupt at the time of the adjudication of bankruptcy, may be proved against the estate of the bankrupt;" that in case of an appeal to the Circuit Court from a decision of the District Court upon a claim of a creditor against the bankrupt's estate, "proceedings shall be had in the pleadings, trial, and determination of the cause, as in an action at law, commenced and prosecuted in the usual manner in the courts of the United States," and the debtor's discharge, if obtained, is from all debts which by the act are made provable against his estate.

If an action could be sustained on this claim before the Circuit Court on appeal, and if the discharge in bankruptcy would relieve the debtor from his liability therefor, then I must hold that the District Court should recognize and allow the same, as a debt provable against the estate in bankruptcy, although the

creditor might fail in his remedy, if his action was pending before the State Court; and from an examination of the decisions of the Supreme Court of the United States, I can entertain no doubt that this claim is provable in bankruptcy, and could be recovered before the Circuit Court by reason of its validity in the place where the contract was made. In *re Suydam et al.* v. *Broadwax et al.*, 14 Peters, 74, it is said, "A sovereign State and one of the States of the Union, if the latter were not restrained by constitutional prohibitions, might, in virtue of sovereignty, act upon the contracts of its citizens, wherever made, and discharge them by denying a right of action upon them in its courts; but the validity of such contracts as were made out of the sovereignty or State, would exist and continue everywhere else, according to the *lex loci contractus*, and it may be laid down as a safe position that a statute discharging contracts or denying suits upon them, without the particular mention of foreign contracts, does not include them. * * * The 11th section of the Judiciary Act was intended to give to citizens of another State, having a right to sue in the Circuit Court, remedies co-extensive with those rights. These remedies would not be so if any proceedings under an act of a State Legislature, to which a plaintiff was not a party, exempting a person of such State from suit, could be pleaded to abate a suit in the Circuit Court." In *re Union Bank* v. *Jolly*, 18 How., 507, the court say, "The law of a State limiting remedies of its citizens in its own courts, cannot be applied to prevent the citizens of other States from suing in the courts of the United States, in that State, for the recovery of any property or money there, to which they may be legally entitled." In the same volume, page 520, *in re Watson* v. *Tarpley*, this principle will be found re-affirmed by the court in the following language: "Whilst it will not be denied that the laws of the several States are of binding authority upon their domestic tribunals, and upon persons and property within their appropriate jurisdiction, it is equally clear that those laws cannot affect, either by enlargement or diminution, the jurisdiction of the courts of the United States, as vested

and prescribed by the Constitution and laws of the United States, nor destroy or control the rights of parties litigant, to whom the right of resort to these courts has been secured by the laws and Constitution." In 20 Howard, 175, *Hyde et al.* v. *Stone*, the language of the court is, "This court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the State which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power." The citation of further authorities on this point is certainly unnecessary.

The legality of this purchase in the place of the contract being admitted, it appearing that a citizen of another State has, in the place of his residence, sold his property to a citizen of this State, for which he is now indebted, and for the recovery of which an action could be maintained against him if he is ever found within the jurisdiction of the tribunals in the State where the purchase was made, unless he shall be discharged therefrom by his certificate in bankruptcy, and these proceedings in bankruptcy being by virtue and authority of the act of Congress which authorizes proof of all legal demands against the bankrupt's estate, I am clearly of opinion that a law of the State denying all remedy for the recovery of this account cannot in any way control the proceedings in bankruptcy of the District Court of the United States, and it is therefore ordered that the appeal of the assignee in this case be dismissed, and the claim of the creditor be established to the full amount thereof.

Mattocks, pro se.

Frank, for claimant.

UNITED STATES DISTRICT COURT—TYLER, TEXAS.

Where bankrupt had filed his petition in bankruptcy, and in due course obtained a final discharge, certain creditors subsequently filed petitions and insisted before the Register that he should grant orders compelling the assignee to sell and convey certain property which had passed out of bankrupt's hands, and over which he had no control, to satisfy judg-

ments which they had obtained against bankrupt, but which Register refused to entertain.

Held, the liens did not exist; but if they did, it was not competent for the creditors to enforce them after the bankrupt had been discharged. The Register was right in his conclusions, and they are ratified and confirmed by the court.

In re CALLOWAY DEAN.

DUVAL, J.—Dean filed his petition in bankruptcy on the 26th of December, 1868, and received a final discharge on the 28th day of January, 1870.

It appears from the statement of facts and exhibits referred to in this case, that Mr. I. J. Roberts, a creditor of the bankrupt, recovered a judgment against him in the District Court of San Augustine county, in the month of October, 1866, for one thousand and thirty-five dollars, and on the 22d day of October, 1869, he filed in the office of the Register at Tyler, proof of debt as shown by said judgment, together with certificates of the proper officers, showing that the same had been recorded during the months of October and November, 1866, in the counties of Navarro, Limestone, Freestone, Houston, and Panola.

Another creditor, Candy Raquet, recovered a judgment against the bankrupt in the District Court of Smith county, on the 27th of November, 1868, for five hundred and forty-one dollars and twenty cents, and on the —— day of ———, 1869, made proof of this debt, with lien as thereby claimed, on about two thousand acres of land, situate in said county of Smith.

It further appears that the bankrupt had become involved several years before his bankruptcy; that his wife had died in 1857; that he had subsequently sold, or otherwise disposed of, largely over his half of the community property, and that under these circumstances, and with a view to indemnify the children of his deceased wife (some of whom were minors) for their portion of the community property disposed of by him, he executed a conveyance to them, on the 10th of July, 1868, of all his lands, except five hundred and fifty acres in Harrison county, three hundred and twenty acres in Limestone county, and one hundred acres in San Augustine county, and of which

lands one-half only were surrendered in bankruptcy. The deed of conveyance to his children was filed for record on the 8th of December, 1868.

On the 5th of October, 1868, an execution was issued on Roberts' judgment, which was levied on the 19th of November, 1868, on one thousand two hundred acres of land in Navarro county. The land was sold on the first Tuesday in February, 1869, and Roberts became the purchaser for sixty dollars.

The creditors, Roberts and Raquet, filed their petition, and insisted before the Register,

First. That he should grant an order compelling the assignee to convey the said one thousand two hundred acres of land to Roberts, by virtue of the judgment, levy, and sale, as aforesaid. This the Register refused to do, because the said one thousand two hundred acres had been conveyed by the bankrupt to his children before the levy was made, and as the bankrupt was not then the owner, the levy created no lien. Further, because the sale was made *after* the filing of the bankrupt's petition, and was therefore void, unless ratified by the assignee, and proceeds paid over to him ; and lastly, because it was not competent for the Register to make such an order, when the land sought to be conveyed neither belonged to the bankrupt nor was surrendered in bankruptcy by him.

Second. That an order of sale should be made for the one hundred acres of land in San Augustine county, in satisfaction of the lien claimed to exist in favor of Roberts by the judgment rendered in that county in October, 1866.

The Register declined making the order on the ground that said judgment created no lien under the law ; that from the 14th of February, 1860, to the 9th of November, 1866, a judgment in a court of record in Texas created no lien on real estate, unless the same was recorded in the clerk's office of the County Court in the county where the land was situated, and that no such record appeared in this case.

Third. That an order should be made by the Register to sell the five hundred and fifty acres in Harrison county, and the three hundred and twenty acres in Limestone county, to

satisfy the lien created in favor of Roberts by recording his judgment therein, before the bankrupt filed his petition in bankruptcy. This order the Register declined granting in full, but directed the assigness to sell one undivided half of these two tracts of land, in satisfaction of said lien, one-half only of said land having been surrendered by the bankrupt, and the other half appearing to belong to other parties.

Fourth. That the Register should order the assignee to sell the tract of about two thousand acres in Smith county in satisfaction of a lien claimed by virtue of the judgment rendered in that county in favor of Raquet, and should decree that the judgment was a lien on said land, notwithstanding the conveyance thereof by the bankrupt on the 10th of July, 1868. This the Register declined doing, because the said land was not surrendered in bankruptcy, and because, at the date of said judgment the legal title was not in the bankrupt; and lastly, because the deed from the bankrupt to his children, although recorded after the rendition of judgment in favor of Raquet, at least passed the legal title of the land to them, and that therefore the judgment was no lien thereon.

Fifth. That the Register should grant an order requiring bankrupt to appear and submit to an examination touching his acts and business, and to give complete statements about the lands rendered and sold, etc. This the Register refused, because the bankrupt had been discharged and was then beyond his jurisdiction.

These were the main points or issues made before the Register, and disposed of by him as stated above. No charge of fraud was made by the creditors against the conveyance by the bankrupt to his children of the 10th of July, 1868, nor any attempt to disturb the same, otherwise than by subjecting the lands to the liens supposed to exist by virtue of their judgments.

I do not believe they existed as claimed; but if they did, it was not competent for the creditors, in such a proceeding as this, to enforce them after the bankrupt had been discharged, or to affect injuriously the rights or interests of the bankrupt's

children, under the conveyance of lands made to them on the 10th July, 1868, without an original proceeding for that purpose, and making the children parties thereto. I think Mr. Register Whitmore is right in his conclusions, and hereby ratify and confirm, in all respects, his action in the premises.

The clerk will so certify to the Register.

UNITED STATES SUPERIOR COURT—OHIO.

Held, **that the provision in the 34th Section of the Bankrupt Law, making the certificate of a bankrupt's discharge conclusive, and allowing an application within two years in the United States District Court to annul it, does not cut off a creditor from setting up a fraudulent concealment by the bankrupt of his property against his certificate of discharge in whatever court he may plead it.**

In re Perkins *v.* Gay.

Taft, J.—The suit is founded on a judgment rendered against the defendant, some twelve years ago, in Erie county, Ohio, for twelve hundred and sixty-six dollars damages and forty-three dollars and ninety-five cents costs.

The answer sets up a decree in bankruptcy rendered October 15th, 1867, discharging defendant Gay from all his debts.

The plaintiff replies that the defendant concealed valuable property when he made his application in bankruptcy, and describes several parcels of real estate situated in Indiana, not included in his schedule, but which the defendant owned at the time of making his application. To this the defendant demurs.

The defendant, to sustain his demurrer to the plaintiff's reply, relies on the 34th Section of the Bankrupt Act of 1867, which provides that "a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts," and that the decree shall be a complete bar to all suits therein, and that "the certificate shall be conclusive evidence of the fact and regularity of the discharge."

The plaintiff, however, claims that there is still another

ordeal to which the bankrupt is liable to be subjected under the 29th Section of the act. This section provides that "no discharge shall be granted, or, if granted, be valid, if the bankrupt has concealed any part of his estate," or "has been guilty of fraud" in any of the sundry particulars in that section specified.

It is provided, in the 34th Section, that, in making an application to set aside the discharge, the creditors shall specify some one of the acts of fraud mentioned in Section 29, and the defendant claims that this indicates that the question of the validity of the discharge, raised under the 29th Section, is to be determined according to the provision of the 34th Section, and not otherwise; and such is the construction adopted by Avery & Hobbs, in their recent and valuable work on bankruptcy. In their comments on Section 34 of the Bankrupt Act, they remark, p. 245, 6, note (b):

"It will be observed that there is no appeal given upon the allowance of a discharge; but, in case any creditor desires to contest its validity, this clause of the act points out the way. It was evidently intended by the framers of the law to limit all contestants to the period of two years after granting the discharge, and to the forum that granted it. In all suits founded upon any claim provable in bankruptcy, the discharge is, by express terms, made 'a full and complete bar,' and there is no such reservation as that in the law of 1841, 'unless impeached for fraud,' etc. It would seem to follow, from the language of this section, that the discharge cannot be impeached in any suit at law founded upon any claim provable in bankruptcy, nor can the regularity of the discharge in any suit be inquired into. There is but one way of contesting its validity, and that is expressly indicated in this section."

Mr. James, on the contrary, in his work on the Bankrupt Law, p. 136, after discussing the provisions for contesting the validity of the discharge under the 34th Section, says:

"The bankrupt has still another ordeal to pass through. If sued by a creditor for a debt due before the adjudication of bankruptcy, such creditor proceeds with his action, and does not

prove under the bankrupt's estate, and the bankrupt, having obtained his order of discharge, pleads it in bar to such action, the creditor may, by way of replication to such plea, impeach such discharge upon any or all of the grounds in respect of which this act invalidates it; and the question thus raised upon the pleadings is that which is to be tried by the jury."

The question of construction thus presented by these two learned commentators, is not without difficulty—a difficulty not at all aided by their disagreement. Under former bankrupt acts, the certificate of the bankrupt has been impeachable for fraud in obtaining it, in whatever court it was pleaded. The present act provides, in the 34th Section, for a proceeding to set aside the certificate of discharge, to be commenced in the court which granted it, within two years. This, however, does not, in our opinion, take away the right to impeach the certificate under the 29th Section, which says expressly that

"No discharge shall be granted, or, if granted, be valid, if the bankrupt has willfully sworn falsely in his affidavit annexed to his petition;" "or if he has concealed any part of his estate or effects;" with several other similar exceptions.

The 34th Section provides:

"That a discharge duly granted under this act, *with the exceptions aforesaid*, releases the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded by a simple averment that, on the day of its date, such discharge was granted to him, and the certificate shall be conclusive evidence in favor of such bankrupt, of the fact and regularity of such discharge.

"Always provided that any creditor of said bankrupt whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of such discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it, to set aside and annul the same. Said application shall be in writing, shall specify which, in particular, of the several acts mentioned in Section 29 it is intended to give evi-

dence of against the bankrupt," etc., providing also, for notice to the bankrupt, and for a hearing; "and that if the court shall find the fraudulent acts proved, and that the creditor had no knowledge of the same till after the granting of said discharge, judgment shall be given in favor of such creditor, and the discharge of said bankrupt shall be set aside and annulled."

It is to be observed that this section, in making the certificate conclusive, expressly says, "with the exceptions aforesaid." For the defendant it is claimed that "the exceptions aforesaid" must be taken to refer to those only which are contained in Section 33, immediately preceding. But we think that they may be taken to refer to all the exceptions to the validity of the discharge which are mentioned in the preceding sections, including Section 29.

The result of the construction claimed for this defendant would be to enable a bankrupt to secure the benefit of a premature discharge from his creditors, though he may have defrauded them by concealing his property.

It may be that the Legislature intended to leave the creditors no longer time than two years to inquire into the fraud. But it seems to offer a permission to fraud and concealment, which is not to be looked for in a Bankrupt Act that professes to discharge a man from his honest debts on the surrender of his property.

It has been argued that the bankrupt would not secure the right to keep his property from his creditors if he should succeed in concealing it for two years. This may be true. The assignee would probably be entitled to recover the concealed property if he could find it. Nevertheless, such a construction of the act as is claimed for the defendant, we think, would encourage fraud. The discharge from personal liability for his debts is the grand object of the bankrupt, and this he is entitled to if he gives up his property. A dishonest bankrupt may hope successfully to conceal his property for two years. If he can secure an effectual discharge, he can afford to run the risk of losing his concealed property after the two years have passed. The creditor would have less motive to detect

the fraud upon the law, as he could not thereby deprive the bankrupt of his ill-gotten certificate, or hold him liable personally. We are unwilling to adopt a construction which will so obviously tend to encourage deception and fraud, unless the language of the act clearly requires it.

It has been the uniform policy of all former bankrupt acts, both in this country and in England, to guard against concealment of property by the bankrupt. The temptation is so strong to hide from his creditors, and his facilities are so great for hiding assets, the existence of which he alone may know, that the severest enactments have not always prevented it. It is not to be presumed that the legislators of the present day would intend to remove any of the guards against temptation and fraud on this critical point. Nor is it to be regarded as a hardship that the bankrupt shall be required to be ready to meet any charge of this kind. The burden of proof is on the creditor who asserts such a concealment; and if the bankrupt is innocent, he need not be very much embarrassed in his defense.

We think, therefore, that the provision in the 34th Section making the certificate conclusive, and allowing an application within two years in the United States District Court to annul it, did not intend to cut off a creditor from setting up a fraudulent concealment by the bankrupt of his property, against his certificate, in whatever court he may plead it.

Demurrer overruled.

UNITED STATES DISTRICT COURT—ILLINOIS

Where bankrupt had, by his agent, unlawfully used funds coming into his hands, belonging to one Mayer, and had offered his draft, due in thirty days, for the money thus appropriated, Mayer refused to accept it, and instructed his attorneys to commence suit by attachment at once; the agent proposed to turn over certain goods to secure the payment of the money made use of, which the attorneys accepted. Neither the bankrupt, his agent, nor the attorneys being in any way aware of the insolvency of the bankrupt.

Jenkins, Assignee, v. Mayer.

Held, as there is no evidence that any creditor or purchaser was deceived or misled, it is good between the parties.
This being a valid pledge of goods, the money paid to redeem the goods from that pledge cannot be recovered.
The goods thus pledged, being of greater value than the debt, should be redeemed for the benefit of creditors.

ROBERT E. JENKINS, *Assignee in Bankruptcy, v.* CONSTANT MAYER.

BLODGETT, J.—This is a proceeding by petition, on the part of Jenkins as assignee in bankruptcy of Heffron, to set aside a certain transaction between the bankrupt and Mayer, the respondent, and to compel the restoration to the assignee of certain payments received in pursuance of the transaction thus attacked.

The facts thus elicited in the evidence are substantially these: Up to some time in August last, the bankrupt Heffron and one A. H. Hovey, were in partnership as seedsmen and florists, and also as dealers in statuary, pictures, and works of art. For the better transaction of the latter branch of their business, they had a "fine art gallery," where articles in that line were exhibited and remained for sale on commission. In the course of this business Constant Mayer, one of the respondents, had forwarded to them a valuable picture, entitled "Good Words," to be sold on commission.

Some time in August last, the copartnership between Hovey & Heffron was dissolved, and the business of the old firm was continued by Heffron. And in the latter part of September or October this picture was sold for three thousand dollars, to be paid over about the 1st of November. Some time in September, Heffron left Chicago for the East, and intrusted the general management of his business to his former partner, Mr. A. H. Hovey, who had power to sign checks and notes. Some time in the latter part of October, a note of Heffron's came due at one of the banks in this city, and Hovey, the managing agent of Heffron, having no other available resources, collected the amount due on the picture sold for Mayer, and used the proceeds for the payment of the note. Heffron, who was at the time at Utica, N. Y., on business, on being advised of this

act on the part of his agent, wrote to Mayer, apologizing for the use of his money and indorsing his draft at thirty days for the amount. On receiving this letter, Mayer at once wrote to Messrs. Hoyne, Horton & Hoyne, his attorneys here, directing them to proceed to collect the money at once by attachment, and denouncing Heffron for this unauthorized use of his money. When this letter came to the hands of Mayer's attorneys here, Heffron was still absent, and Hovey in the general charge of his business. The attorneys called upon Hovey for a settlement of their client's demand, and informed him of their instructions in the premises. Hovey assured the attorneys that Heffron was abundantly solvent and able to pay his debts, but that he was unavoidably detained at the East, by the illness of his wife; and that when he returned, which they expected would be in a few days, the money would certainly be paid, and proffered them security if they would not commence suit. The result of the interview was that Hovey, as attorney and agent for Heffron, made and executed a bill of sale under seal, absolute on its face, to Mayer, for a lot of pictures, works of art, and other property, the value of which was about five thousand four hundred dollars, as stated in the schedule thereof, but the real purpose of which was to make Mayer secure for the amount of his funds thus appropriated to Heffron's use by Hovey. At the same time this bill of sale was executed by Hovey, the property described therein was nominally turned over to J. Albert Hovey, a young man who seems to have been partially employed about the premises, to hold for Mayer; but the goods were not removed from the store, nor their visible possession and ownership changed. It is conceded that A. H. Hovey had no authority under seal to execute the bill of sale, his sole authority in writing resting on a letter from Heffron, authorizing him to sign checks and notes and attend to his (Heffron's) business. About the 1st of December last, Heffron returned to this city and resumed the control of his affairs. He was informed of this transaction between Hovey, as his agent, and Hoyne, Horton & Hoyne, as attorneys for Mayer, and replied, "he should not have done so if here; yet, as it was done, the

arrangement had better be carried out;" or words to that effect. Soon after his return a proposition was made by some customer to change a picture he had for one of those conveyed by the bill of sale, and pay the sum of six hundred dollars difference; and after consultation with Messrs. Hoyne, Horton & Hoyne, this exchange was effected, and the six hundred dollars was paid directly over to Messrs. Hoyne, Horton & Hoyne by the purchaser, and by them credited to Heffron on the amount due Mayer. Subsequently Heffron placed a large portion of his works of art in the hands of an auctioneer for sale at auction, among which were a part of the goods included in the bill of sale, and a portion, about six or eight hundred dollars worth, of the goods mentioned in the bill of sale were sold. And on or about the 20th of December last, Mr. Heffron paid to said attorneys, for Mayer, one thousand dollars more. Since the commencement of the proceedings in bankruptcy against Heffron, another picture included in the bill of sale has been sold for one hundred and fifty dollars, and the proceeds of which are in the hands of E. I. Tinkham, provisional assignee, subject to the decision of the questions involved in this cause. It is also agreed that a lot of potatoes included in the bill of sale have been sold for two hundred and forty dollars, and the proceeds are held subject to this decision. It is objected that this transaction is fraudulent as against the assignee of Heffron, because:

First. It gave Mayer, a creditor, an undue preference over the other creditors of Heffron.

Second. Hovey, the agent of Heffron, who executed the bill of sale, had no sufficient authority for his acts in that regard.

Third. Said goods were suffered to remain in the control of the bankrupt without visible change, or control, or possession.

In support of the first point numerous decisions, by my predecessor and other District Courts, have been cited, all tending to establish the conceded point that any act intended to give a preference is void under the Bankrupt Act. The right and authority of these decisions is not denied, but the question is, was this a case where a preference, such as is prohibited by the

act, was intended. Heffron, by his agent, had unlawfully used the funds of Mayer coming into his hands, and had offered his draft, due in thirty days, for the money thus appropriated. Mayer refuses to accept the draft, but directs his attorneys to commence suit by attachment at once, and Hovey, who had acted for Heffron in the use of the funds, and who was still acting for him, proposed to turn over the goods in question to secure the payment of the money, saying he had no doubt it would be adjusted immediately on Heffron's return, which was daily expected. And the attorneys of Mayer took the responsibility of accepting the security, instead of commencing suit as their client had directed. These facts seem to me to clearly take the case out of the class of cases cited. There is no pretense that Mayer or his attorneys had any actual knowledge of Heffron's insolvency at the time this transaction took place, although there is evidence going to show that he was, in fact, insolvent at the time, but was not himself aware of the fact, nor was Hovey, his general agent, so aware. But it is claimed that the cases cited show that "*insolvency consists in present inability to pay debts*," and that Mayer, through his attorneys, knew that he could not pay this debt, and was therefore insolvent. This rule might apply if Heffron had been present and the negotiations had been with him. But he was absent, and that absence was alleged as the sole reason for non-payment, and the reason given for such absence was not such as would excite any suspicion of insolvency or present inability to pay. Clerks and agents are not supposed to have entire control of the resources of their principal to such an extent as to make their failure to meet an obligation of their principal an act of bankruptcy against him.

And, in this case the proof is ample that no suspicion of insolvency had entered the mind of Heffron or his agent, Hovey. The bill of sale was executed as a temporary expedient to indemnify the attorneys for the responsibility they took, in disregarding the instructions of their client, by withholding the suit he had instructed them to commence.

I do not think, therefore, that the evidence shows this to be

a case of fraudulent preference of a creditor within the Bankrupt Act, and the cases cited which have arisen under it.

In regard to the second point, that Hovey had no authority to execute the bill of sale, I deem it sufficient to say that it did not require a written authority, and that Mr. Heffron, before the proceedings in bankruptcy, and immediately on his return, ratified the act of Hovey and acquiesced in the same. It is objected that the bill of sale being under seal, the ratification must be by as solemn an instrument; but this, I apprehend, only applies when it is necessary that the original should have been under seal. As to the other objection, that the goods should have been separated, the evidence shows they were placed in charge of J. Albert Hovey, and that Mr. Heffron acquiesced in his assumed custody; and as there is no evidence that any creditor or purchaser was deceived or misled, I shall deem it good between the parties, and only concede to the assignee the assertion of such rights in regard to the property as Heffron might have asserted at the time proceedings in bankruptcy were commenced.

As to that part of the petition which claims a refunding to the assignee of the money received from Heffron since the bill of sale was executed, this depends upon the question whether the transaction between Heffron, through Hovey, his agent, and Mayer, through his attorney, was valid, and whether that, although an absolute sale on its face, was, in fact, only a pledge. Having come to the conclusion that this was a valid pledge of the goods, it seems to me that money paid to redeem the goods from that pledge cannot be recovered. It seems clearly for the interest of the estate that the goods thus pledged, being of much greater value than the debt, should be redeemed, in order that the creditors may have the benefit of the excess in value over the debt secured by them.

UNITED STATES DISTRICT COURT—RHODE ISLAND.

Where eleven objections to a discharge were filed and pressed by opposing creditors, and under each an issue of fact was raised, and evidence and argument submitted,

Held, the opposing creditors having established a *prima facie* case of fraud, the petitioner is not entitled to his discharge.

In re PHILIP A. DOYLE.

KNOWLES, J.—The petitioner, on his own application, was declared a bankrupt on the 29th of December, 1868. His petition for a discharge was filed on the 9th of November, 1869, and specifications of two creditors, in opposition, were filed on the 22d of January, 1870. The hearing upon these specifications were, by consent, postponed from time to time until May 4, on which day, and on several subsequent days, including the 10th of June, the parties were fully heard.

As the case was submitted to me upon both law and fact, it seems essential, in delivering my judgment, simply to enunciate or indicate my rulings upon the points of law, if any, raised before me, and to announce my findings upon the issues of fact. An elaborate discussion of the facts proven, in vindication of those findings, I deem neither necessary nor expedient. We listen to no argument from a jury in support of the verdicts they render, and I fail to see why, when parties elect to constitute the court, *pro hac vice*, a jury, a labored argument in support of its conclusions of fact should be inflicted upon parties and counsel. Upon parties and counsel, I say, for to them only can such an argument with propriety be addressed, inasmuch as they only can be presumed to feel any interest in the matter, and they moreover, generally speaking, are the only persons who can know enough of the case, as it chanced to be presented to the court upon the proofs and argument, to be authorized even to form an opinion, as to the soundness or unsoundness, the justice or injustice of the decision. They, it is presumable, care not to hear a third argument from the Bench, for or against them, in support of a judgment with which it is

probable but one party will, save upon sober, second thought, if ever, be fully satisfied.

The objections to a discharge, filed and pressed by the opposing creditors, are eleven in number, and under each of them an issue of fact was raised, and evidence and argument were submitted. Of the fourth, fifth, and eleventh specifications I shall first treat, here quoting them:

"*Fourth.* That the said Philip A. Doyle has been guilty of fraud in this: that he has not delivered to his assignee a stock of goods consisting of groceries, liquors, and other articles of great value, which at the time of the presentation of his petition and inventory belonged to him, and were in his possession, in the store occupied by him on Canal street, in said city of Providence; and a beer pump, and other goods and property, in the store now or formerly No. 3 Peck street, in said city of Providence.

"*Fifth.* That the said Philip A. Doyle has concealed a part of his estate and effects, namely: the stock of goods aforesaid, and a beer pump, and other goods and property, in the store now or formerly No. 3 Peck street, in the said city of Providence, which are not included or mentioned in the schedules filed with his petition.

"*Eleventh.* That the said Philip A. Doyle, being a tradesman, has not, subsequently to the passage of the Act of Congress aforesaid, kept proper books of account; in this, that he has kept no bill-book, or invoice-book, or any other books of account, except a day-book, ledger, and cash-book."

The issue raised under these specifications, is one purely of fact. The creditors, assuming the burden of proving their allegations, upon the evidence maintain that the petitioner from the spring of 1854 to the filing of his petition on the 24th of December, 1868, was engaged in the liquor and grocery business, in truth and fact, for himself, though pretendedly and ostensibly as an agent—a portion of the time of one O'Reilly, a merchant tailor, of Providence, and afterwards of one O'Donnell, a liquor dealer of Boston; and accordingly they contend that when he filed his petition, he should have scheduled the

goods and effects in the two stores named in the specifications, including the beer pump named, and also all debts due for goods sold from those stores; of course contending also that he was bound to keep, subsequently to the passage of the Bankrupt Act, proper books of account. The answer of the petitioner is simply that as to the store on Peck street, he was never the keeper of it, or interested in it, in fact, further than that he procured a license for it in his own name, for the benefit and accommodation of a friend and customer, a Mr. Stewart, to whom the city authorities would not grant a license; though he did (as agent, as he says) procure for use in said store, in August, 1868, and lend or let to Stewart, a beer pump apparatus, costing one hundred and ninety-five dollars cash, which, since the filing of his petition, he had claimed as his property as agent. And as to the store on Canal street—he says the business prosecuted there was, from the spring of 1864 to the spring or summer of 1865, the business of Owen O'Reilly—he, the petitioner, being simply O'Reilly's agent—and that, since the failure of O'Reilly (as a merchant tailor), the business has been carried on there by a Mr. O'Donnell, of Boston—the petitioner being his agent or hired servant, and nothing more. Therefore, contends he, as he was not owner of the property in that store, or of the beer pump, he could not inventory them as his property—and as he was engaged in no business—neither merchant nor tradesman, he had no occasion, nor was he bound to keep books of account of any kind.

My conclusions upon the proofs and arguments are: Firstly, that the creditors fail to show that the petitioner was interested in any property or effects in the Peck street store, other than the beer pump apparatus. Secondly, that they do show that the business on Canal street, while O'Reilly figured as nominal principal, was in truth the petitioner's—the only object of the arrangements between petitioner and O'Reilly being to enable the former to prosecute for his own gain, undisturbed by his numerous creditors, the business in which he had formerly been engaged, and to which an end was put in December, 1868, by a general assignment for the benefit of creditors, in the very

worst form of even Rhode Island assignments, under which it happened, as usual, that no outside creditor ever received a farthing. Third, that the creditors do show, if not that the arrangement with O'Donnell is identically the same as was that with O'Reilly, yet that it most probably was and is the same in fact and in legal effect—no less illusory—no less fraudulent—not less a sham; and thus, in my judgment, impose upon the petitioner the burden of overthrowing their *prima facie* case. And lastly, that this *prima facie* case is not overthrown, if indeed, it be at all weakened, by any proofs adduced by the petitioner, or any argument submitted by his ingenious, learned, and zealous counsel.

It may be true that O'Donnell was, in 1868, the owner *de facto et de jure*, of the Canal street store and its belongings, and of the beer pump in the Peck street store; and it may be that evidence could be adduced corroboratory of the petitioner's somewhat faltering, vague, and discordant declarations and statements in regard to this point. But be this as it may, it is my province to deduce conclusions from the evidence submitted, and that, as I have already stated, not only warrants but dictates a judgment to the contrary. His schedule, rendered under oath in December, 1868, should have disclosed his ownership of the property in question; and as it did not, I adjudge the fourth, fifth, and eleventh specifications sustained by the proofs, and the petitioner not entitled to his discharge.

In regard to the remaining specifications, it is unnecessary to say much in this connection. It is, however, but justice to the petitioner to say, that I find the ninth and tenth specifications, relating to the claim of William Doyle, to be unsustained; and but justice to the opposing creditors to say, that the evidence submitted in support of the remaining specifications (grounded on the petitioner's omission to assert or disclose in his schedule a title in himself to certain estates, formerly belonging to him, but now claimed to be the property of his wife) fully justifies their suspicions and surmises, if not their formal averments. I, however, refrain from passing upon those specifications, even *pro forma*, for the reason that upon two or three

points of law which seem to me to be involved, and which were not raised at the hearing, it is desirable, before expressing a judicial opinion, to be enlightened by arguments of counsel.

The record of the suit in equity, *Peckham, assignee*, v. *James Doyle et al.*, offered in evidence by the petitioner on the 10th of June, and received *de bene*, under objection, I adjudge inadmissible, whether regard be had either to its character as evidence, or to the stage of the trial when it was proffered.

Agencies (so called), like that which I find to have existed between the petitioner and O'Reilly and O'Donnell, successively, were an irrepressible outgrowth of the laws regulating the relations of debtor and creditor, as these existed prior to the enactment of the Bankrupt Act: and it was reasonably anticipated, as one of the benefits which that act would confer, that these so-called agencies, corrupting and demoralizing to the community at large, as well as to the parties concerned, and their relatives, privies, and employees, would come to an end, throughout the land. Under the beneficent provisions of that act, in July, 1867, the way was open to every man, no matter how heavily burdened by debts, to relieve himself of his pecuniary obligations. He was required simply to be honest, surrendering to his creditors whatever he possessed, and whether his assets yielded to them a dividend small or large, or nothing, he secured to himself a discharge, and became once again a free man. If it should happen, as perchance it might, that a compliance with this requisition, under the pressure of an oath, would necessitate humiliating and damning confessions of deceit and fraud, in days gone by, still the obligation to be honest in word and act must be respected, if a discharge from his debts was desired. The Bankrupt Act humanely provides relief for the honest, and, not less humanely, prescribes punishment by penalties and privation and disabilities for the knavish. It gives little heed to the antecedents of the petitioner for its benefits. Whatever his offenses against heaven's laws, or man's laws, in the remote past, let him show that since the passage of the Bankrupt Law its requirements have

been respected, and he may confidently, and without harmful self-abasement, claim the exercise in his behalf of its debt-discharging power. This, it must be borne in mind, is a condition-precedent of relief which no court is empowered to waive; and more than this, a requirement with which agent-arrangements between an insolvent debtor and his friends and relatives of easy virtue, or no virtue, such as I find to have existed between the petitioner and O'Reilly and O'Donnell, cannot be made even to appear consistent.

Eames & Payne, for the opposing creditors; *Blake & Gorman*, for petitioner.

UNITED STATES DISTRICT COURT—TYLER, TEXAS.

Where a mortgage was given by bankrupt, on five bales of cotton, while a lien existed on three hundred and twenty acres of land, in favor of mortgagee, which Register claimed was a waiver of the prior lien,

Held, the Register was in error. The lien on the land was not waived, nor in any way affected, by the mortgage on the cotton. The creditor has a valid, subsisting lien upon said three hundred and twenty acres of land; and that the opposition of bankrupt thereto be overruled. The assignee is ordered to sell said land, according to law, to satisfy said lien.

In re SOLOMON HUTTO.

DUVAL, J.—I have carefully examined in this case in connection with the questions certified to me for decision. My opinion is that the Register was in error, when he held that the mortgage given by the bankrupt, on the five bales of cotton, was a waiver of the prior lien on the land. He should have held that the vendor's lien upon the three hundred and twenty acres of land, claimed as a homestead by bankrupt, subsisted as against the same, in favor of the creditor, Joseph Werner. It is very clear to me, that this lien was not waived, or in any manner affected, by the mortgage given on the cotton.

It is therefore adjudged that the said creditor has a valid, subsisting lien upon the said three hundred and twenty acres

of land, and that the opposition made thereto by the bankrupt be overruled.

It is further ordered that the assignee of said bankrupt do proceed to sell, according to law, the said tract of three hundred and twenty acres of land, to satisfy the lien existing thereon, in behalf of the creditor, Werner.

The clerk will certify this decision to the assignee.

INDEX.

ACT OF BANKRUPTCY.

1. Under the Bankrupt Act, an assignment, whether the assignor be solvent or insolvent, with intent to delay, hinder, or defraud, is an act of bankruptcy. *Randall & S.*, 18.
2. The giving of a note by a debtor, and causing it to be sued for the purpose of preventing an attachment by a creditor, is an act which has a direct and necessary tendency to defeat and delay creditors generally, though it is aimed against one only. *Williams*, 286.
3. To constitute an act of bankruptcy, the fraudulent stoppage and non-resumption of payment must be of commercial paper given by the debtor in his character as a merchant or trader. *McDermott Bolt Co.*, 128.
4. When commercial paper is due, and it is not paid, because, without adequate legal excuse, the maker will not, or is not able to pay, and it is continued for the period of fourteen days, *Held*, that this constitutes an act of bankruptcy. *Thompson & McClallen*, 184.
5. Where payment of commercial paper is not resumed within fourteen days, it is not necessary that the original stoppage should have been fraudulent to constitute it an act of bankruptcy. *Weikert & Parker*, 27.
6. A general assignment of all a debtor's property for the benefit of all his creditors, without preference, is forbidden by the Bankrupt Act, and is an act of bankruptcy. *Goldschmidt*, 164.

ADJOURNMENT.

On the due return of warrant by marshal in a case of involuntary bankruptcy, counsel for bankrupts moved for further time to prepare proper schedules, the number of creditors and non-adjustment of accounts having prevented their completion. No one opposing, Register certified the facts and asked for new warrant to issue.

Held, the proper course was for the Register to adjourn the meeting of creditors to a day certain, on the ground of non-service of notice to creditors, and to have directed service of new notice, by mail or personally. *Schepeler et al.*, 170.

ADJUDICATION.

The adjudication is not conclusive upon a fact which goes to defeat the jurisdiction of the court over the supposed bankrupt. *Goodfellow*, 452.

AFTER ACQUIRED PROPERTY.

See ARREST; *Davis*, 339.

AGENT.

Married woman did business in her own name by her husband acting as her agent, and exercising entire control and management of the same in his discretion. She became unable to pay her debts in the ordinary course of business, as persons in trade usually do, and executed mortgages of property to secure creditors on pre-existing debts, and thereafter was adjudicated a bankrupt. On the questions raised upon petition of the assignee to have the said mortgages set aside as invalid,

Held, the acts of the husband as agent of the bankrupt, his knowledge and intentions, are the acts, knowledge, and intentions of the bankrupt. *Graham, Assig.*, v. *Starke* 357.

ALIENS.

1. An alien resident within the United States may take the benefit of the Bankrupt Law. *Goodfellow*, 452.
2. Such person need not have resided within the district in which application is made for a period of six months. *Id.*
3. An alien need not have resided six months within the district in which he makes the application. *Goodfellow*, 452.

AMENDMENTS.

Bankrupt may, by order of court, amend his schedules, even after the consideration of specification in opposition to his discharge. *Preston*, 103.

ANSWER.

1. Answer need not be verified. If debtor, in cases of involuntary bankruptcy, do not appear on return-day of rule, he cannot demand a trial of issues by a jury. *Gebhardt*, 268.
2. The holders, respectively, of two promissory notes past due, petitioned jointly to have the drawer, their debtor, adjudicated bankrupt. The defendant denied insolvency, and pleaded payment of said two notes by petitioners accepting certain other notes, provided they proved, on inquiry, to be collectible. Petitioners demurred to the sufficiency of the answer. *Held*, answer sufficient. *Ouimette*, 566.

APPEALS.

APPEALS LIE.

1. To the Circuit Court, from decisions of the District Court in three classes of cases only. First. In cases in equity decided in the District Court, between the assignee and persons claiming adverse interest. Second. Decisions rejecting wholly, or in part, the claims of supposed creditors. Third. Decisions allowing such claims. *In re* Alexander, 30, 31.
2. The right of appeal can neither be enlarged or restricted by the District or Circuit Courts. *Id.*, 32.
3. The requirements of the act, that the appeal shall be claimed, bond filed, and notice given within ten days after the decision, and that it be entered at the term of the Circuit Court held within the district next after the expiration of ten days, are jurisdictional facts necessary to authorize the Circuit Court to pass upon the appeal. *Id.*, 32.

4. A holder of a second lien on encumbered realty assets in the hands of the assignees in bankruptcy, and a tenant of the assignees, in their name and with their approval, appealed from two orders of the District Court that the property be sold, and the first lien be received in part payment. The assignees withdrew permission for their names to be used in the proceedings on the appeal; whereupon application was made by the second lien holder and the tenant to file bill in equity praying appropriate relief.

Held, that the special appellate jurisdiction of the Circuit Court is limited to controversies between assignees and claimants of adverse interests, and to controversies between assignees and creditor claimants.

5. Appeal would not lie from the orders in question, and would not lie in any case unless made under the conditions prescribed by Section 8 of the Bankruptcy Act.

6. The general revisory jurisdiction of the Circuit Court extends to all decisions of the District Court or District Judge at Chambers, which cannot be reviewed upon appeal or writ of error under the provisions of said section. *Alexander*, 29.

7. An appeal must be taken within ten days after the entry of the decree or decision appealed from. *Id.*, 32.

8. Whether, under Section *eight* of the Bankrupt Act, the order of the District Court discharging a bankrupt can be reviewed in the Circuit Court by appeal or writ of error—*Quære.*

9. It certainly cannot be reviewed upon error, where the record presents only questions of fact.

10. But under the *second* Section of the Bankrupt Act, which gives the Circuit Court "superintendence and jurisdiction of all cases and questions arising under the act * * upon bill, petition, or other proper process of any party aggrieved," any creditor considering himself aggrieved by the discharge of the bankrupt, has a right to be heard on that matter in the Circuit Court. *Ruddick* v. *Billings.*

11. An order was made in the District Court on the 8th of May, rejecting and expunging certain debts and proofs thereof, and awarding to the assignee costs, to be taxed against the creditors whose debts were rejected, and ordering that the assignee recover judgment against said creditors, and that he have execution against them therefor, from which the said creditors appealed.

Held, the order was not one from which an appeal would lie, and the appeals not having been claimed and noticed within ten days after the entry of the decision appealed from, they must be dismissed. *Kyler*, 46.

APPEARANCE.

A party having once regularly appeared by attorney, cannot withdraw such appearance unless by consent of the court, or of the prosecuting party. *Ulrich*, 133.

ARRANGEMENT.

Where counsel representing creditors at the first meeting of creditors offered a resolution that the court be requested to make an order authorizing the

assignee to compromise and compound certain debts due the *bankrupt's* estate, by and with the consent of a committee of three creditors therein named, which resolution was voted for by all save two creditors,

Held, that the said order is not warranted by any provision of the act, or by General Order 17. *Dibblee*, 72.

ARREST.

1. The bankrupt cannot be arrested in proceedings under the act of 1831, of this State (New York), known as the "Stillwell Act," by a creditor seeking to reach the property of the bankrupt. *Goodwin* v. *Sharkey*, 558.

2. A debtor having property in New York, was arrested on mesne process of State court, upon a debt of over one hundred dollars, founded on contract, and was released from close custody, on bail, but process was not discharged within seven days.

Held, said debtor had not in respect of the premises committed an act of bankruptcy under the provisions of Section 39 of the Bankruptcy Act, he not having been actually imprisoned for more than seven days on said order of arrest. *Davis*, 389.

ASSETS, LEGAL.

1. M. & S., a firm of country merchants, was dissolved by mutual consent, and S. took the books and accounts to collect and pay the firm debts. M. retained the stock of goods, and continued in business, in the course of which he added and mingled new stock with the old, so that they were undistinguishable. S. thereafter was adjudged a bankrupt on his own petition, and subsequently M. was adjudged a bankrupt upon petition of creditors, and the whole stock in his hands was taken possession of and sold by his assignee in bankruptcy.

Held, such assets must be regarded as belonging to M.'s individual estate, and primarily liable to his individual debts in full, before any portion can be applied to pay the debts of M. and S. *Montgomery*, 429.

2. Rights and rights of action of a bankrupt, in suits and actions pending in State courts, pass and vest in the assignee in bankruptcy. The bankrupt ordered to execute proper instruments to enable the assignee to represent him in his action in the State court, and enjoined further proceedings in respect thereof without leave of the Bankruptcy Court. *Clark & Bininger*, 491.

3. A father, resident of Georgia, bequeathed lands therein to the husband of his daughter, in trust "for her sole and separate use, during her natural life, and the use of her children," with limitation over on her death to her then husband and children living, share and share alike, with a clause that no part of the property should be liable for the debts of any present or future husband. The wife having died and the husband become bankrupt,

Held, he took, under the laws of Georgia, on her death, a fourth interest in fee in the said lands.

The clause against the use of any part of the lands in payment of debts of husband, applied during the life of the wife only, and does not apply after the fee vested in the husband. *Myrock*, 154.

ASSETS, EQUITABLE.

4 Proceedings in bankruptcy may be regarded as an equitable attachment, and the equitable interest vested in the assignee in bankruptcy for the benefit of all the creditors. *Hinds*, 351.

ASSIGNEE.

1. Where counsel representing certain creditors objected to the votes being received for choice of assignee, from certain other creditors, alleging the same to have been procured by collusion of the bankrupt, and offering testimony in support, the Register declined to hear such proof. *Noble*, 96.
2. At the meeting of creditors, several members of one family offer proofs of claims for a large amount against the bankrupts, which were objected to by counsel for opposing creditors, and a postponement for investigation by the assignee, took place. One of the first-named creditors, who is a son of one of the bankrupts, having a claim of fifty-six thousand nine hundred and thirty-nine dollars and eight cents against the estate, is elected assignee, which counsel aforesaid object to.

Held, the son of a bankrupt is not the proper person to be invested with the power of assignee and investigate the claims of other members of same family. Appointment not affirmed. *Bogert & Oakley.*

3. Proper notice must be given by the assignee to creditors, and the Register should see that this duty is performed. The non-performance of it renders the bankrupt liable to lose his right to a discharge. *Bushey*, 685.
4. Motion by assignee to be made a party to actions brought to recover possession of certain tobacco alleged to have been wrongfully taken and converted by defendant, afterwards declared bankrupt,

Held, the assignee should show some right to the property in controversy in order to make him a party. Such conversion by his principal is of itself not a good reason for supposing he has right to the property in question. Motion denied. *Gunther*, 730.

5. See PLEADING, *Goodwin*, 417; ENCUMBERED PROPERTY, *Mebane*, 847; REGISTER, *Herrman & Herrman*, 618; PROCEEDINGS IN BANKRUPTCY.

ASSIGNEE, CHOICE OF See FRAUDULENT PREFERENCE, *Chamberlain*, 710.

ASSIGNMENT.

1. A general assignment, though it should direct the property to be distributed according to the provisions of the Bankrupt Act, defeats the provisions of the act in this, that it deprives the creditors and gives to the debtor the election of the trustee to wind up the estate. *Randall & Sunderland*, 24, 5.
2. And it is equally so whether the assignor be solvent or insolvent. *Id.* 25, 26.
3. Where property mortgaged remains in the possession of the bankrupt at the date of the commencement of proceedings in bankruptcy, the possession of the bankrupt of the mortgaged property was, after the appointment of the assignee, the possession of the assignee, and its removal by

the mortgagee without assignee's knowledge or consent, was unlawful. *Rosenberg*, 130.

4. A trader being and knowing himself to be insolvent made an assignment creating no preferences among his creditors, of all his property, for their benefit. About ten months thereafter he filed voluntary petition in bankruptcy, and his discharge being opposed by creditors, on specification that such assignment had been made by him, in contemplation of becoming bankrupt, for the purpose of preventing the distribution of his property under the Bankruptcy Act in satisfaction of his debts,

Held, bankrupt made such assignment with intent to delay and hinder creditors. *Goldschmidt*, 164.

5. When an assignment was made by bankrupt, of lands in Florida, for the benefit of such of his creditors only as should sign a compromise agreement,

Held, void as against assignee in bankruptcy. *Broome*, 444.

6. A general assignment by a debtor of all his estate and effects is not of itself merely an act of bankruptcy, but when the debtor is for other causes adjudged bankrupt, his assets will be administered under the provisions of the Court in Bankruptcy. *Kintzing*, 217.

See INTENT, *Smith*, 373; PRACTICE, *Sedgwick* v. *Place*, 302.

ATTORNEY.

When an attorney is not privileged from answering, being called as a witness. *O'Donohoe*, 245.

BANKRUPT.

1. Where counsel for involuntary bankrupt petitioned the court for an order to be paid counsel fees and expenses out of the assets in the hands of the assignee, the bankrupt not having the means therefor, and the services rendered being in the preservation of the bankrupt estate for the assignee in bankruptcy,

Held, such order would be made upon the assignee approving in writing the payment of the counsel's bill. *Montgomery*, 137.

2. Where a discharge is refused bankrupt on the ground of his having given a preference,

Held, the bankrupt is a trustee for his creditors. Property must be administered in accordance with the provisions of the national Bankrupt Law. *L. J. Doyle*, 640.

BANKRUPT ACT.

Section 33 should be construed, in relation to the word "assets," as if it read, "The proceeds of the bankrupt's property in the hands of the assignee, and subject to be divided among his creditors, must be equal to fifty per cent. of claims," etc. *Frederick*, 465.

BONDS.

1. On motion of creditors for an order to have assignee file a new general bond, of which two of the sureties had become bankrupt and the third

surety was his wife, conditioned that he would faithfully discharge the duties of the office in every case in which he was or should become assignee,

Held, that a general bond for such purpose is not authorized by the Bankruptcy Act, but that an assignee must give special bond in each case where a bond is necessary. *McFaden*, 104.

2. By the laws of Texas a wife cannot change her separate estate by becoming surety on such a bond, and nothing to its worth is added by her execution thereof. *Id.*, 106.

BOOKS.

1. No discharge will be granted where the bankrupts, merchants, have failed to keep cash-book. Specification that bankrupts had not kept proper books of account, in that they did not show what moneys were received or disbursed, is sufficiently specific to admit evidence that no cash-book whatever was kept for a period of time. *Bellis & Milligan*, 496.
2. The bankrupt, who is a tradesman, must keep a cash-book, otherwise he cannot obtain his discharge. *Littlefield*, 57.
3. The Bankrupt Law requires merchants to keep proper books of account, with such reasonable fullness and accuracy as to enable the assignee to acquire the information which books are intended to disclose. But a temporary, accidental omission, in good faith, and for a reasonable time, to make entries, would not be a failure to keep books of account within the meaning of the law.

Merchants are responsible for the negligence of their clerks, and must see that proper books of account are kept.

Entries on numerous slips of paper, each entry on a separate slip, as a permanent form of keeping accounts, is not a keeping of books of account within the meaning of the law. *Hammond v. Coolidge*, 273.

4. The accidental omission of entries in a trader's book is not conclusive of his not having kept proper books of account. *Burgess*, 196.
5. Where it clearly appears that a trade formerly carried on by the bankrupt had been ended before the bankruptcy, and that nothing concerning that trade remained outstanding, so that there was nothing for the assignee in bankruptcy to inquire into or to do concerning the same, the failure of the bankrupt to keep proper books of account for that trade will not bar his discharge. *Keach*, 13.

BURDEN OF PROOF.

A trader unable to pay his debts in the ordinary course of business is *prima facie* insolvent, and the burden of proof is upon him, in such a case, to show that he is solvent. *Aliter*, as to a farmer, where the petitioner must prove the actual insolvency of the alleged bankrupt. *Miller* v. *Keys*, 225.

See FRAUDULENT SUSPENSION.

CERTIFYING QUESTION.

It must be shown in the certificate of the Register, that the question certi-

fied arose upon a point or matter in the course of the proceedings before him. *Peck*, 757.

CHATTEL MORTGAGES.

See INTENT, *Smith*, 373.

CHAMPERTY.

An agreement of certain creditors with a solicitor that he should prosecute at his own expense, and save them harmless, in consideration of his retaining three-fourths of all sums recovered, their claims against bankrupts based on debts valid in their inception, is no defense against the same on account of champerty. *Lathrop et al.*, 410.

CIRCUIT COURT.

One Clark commenced action in State court against his copartner for an accounting, and receivers were appointed, who took possession of the firm property. Pending such proceedings, the firm, with its members, was declared bankrupt upon petition of firm creditors. Clark petitioned to the United States Circuit Court for a review of the decree adjudicating him a bankrupt, and commenced successively two other actions in State court, and obtained injunctions restraining creditors from prosecuting proceedings in bankruptcy. Creditors thereupon moved the Circuit Court for a writ of prohibition, under the Judiciary Act of 1789, directed to the State court in the premises.

Held, the court can grant such writ only in cases where it is necessary for the exercise of its jurisdiction. Such jurisdiction in this case is revisory, and is not obstructed or interfered with by the actions prosecuted by Clark in the State court. Motion denied. *Bininger et al.*, 481.

COLLECTION OF DEBTS.

A single creditor whose debt is secured by a lien on lands of greater value than the amount of his debt will not be permitted to abandon all remedies open to him for the collection of his debt, and use the Bankruptcy Court for the purpose. *Avery* v. *Johann*, 144.

COMMERCIAL PAPER.

1. *Semble.* Commercial paper in this section means paper which, by the law governing the contract, has the ordinary qualities and incidents of negotiable paper in the sense of the law merchant. *Hollis, Kenney et al.*, 310.
2. A note executed in Cincinnati, Ohio, for the unconditional payment of a certain sum of money, and payable to the order of the payee, is "commercial paper" within the meaning of the 39th Section of the Bankrupt Act. *Heinsheimer et al.* v. *Shea & Boyle*, 187.
3. Where a Corporation was charged with fraudulently stopping, and not resuming payment within fourteen days, of its commercial paper, consisting of two instruments; one, a promissory note signed by the Secretary and President, reading "on demand, after date, we, The McDermott Patent Bolt Manufacturing Company, promise to pay to the order of John E. Walsh, three hundred dollars at the office of Company, value received,"

and the other, in form a Due Bill, and reading: "Received, New York, Nov. 7, 1868, from Mr. J. C. Brinck, two hundred dollars for the McDermott Patent Bolt Manufacturing Company, value received, as a loan for their use, the same to be returned, due on demand,"

Held, that the said instruments did not constitute commercial paper within the meaning of the act, and no act of bankruptcy had been committed by failure to pay the same. *McDermott Bolt Manufacturing Co.*, 158.

4. The term "commercial paper," as used in the Bankruptcy Act, denotes bills of exchange, promissory notes, negotiable bank checks, paper governed by those rules that have their origin and are established upon the customs of merchants known as the law merchant.

5. To be a debtor's commercial paper within said Clause 9, the debt which the paper represents must have been incurred by him in his character of banker, merchant, or trader; whether as principal or otherwise, is immaterial. *Nickodemus*, 280.

See ACT OF BANKRUPTCY, *McDermott Bolt Company*, 128.

CONSTRUCTION.

1. The phrase "longest period" during such six months, means the longest period in which business was carried on in any district during such time, and not the greater portion of the six months. *Foster & Pratt*, 287.

2. An act which the bankruptcy statute declares shall be *prima facie* evidence of fraud, must be deemed to be contrary to its provisions, unless the presumption is repelled by opposing proofs. *Kingsbury et al.*, 318.

3. When persons distinctly named in an instrument of writing as parties of the second part, sign their names as witnesses, it is not for that reason an *ex parte agreement*, but both parties are bound as though they had signed as such. *Phelps v. Clasen*, 87.

CONTEMPLATION OF BANKRUPTCY.

Contemplating committing an act of bankruptcy is contemplating becoming bankrupt. *Goldschmidt*, 164.

CONTEMPT.

No judgment can be rendered against a third person for contempt in disobeying an injunction issued in aid of the writ of bankruptcy, without proper proceedings taken against him distinct from those against the bankrupt. *Creditors v. Cozzens & Hall and McCreery*, 281.

CORPORATIONS.

1. A bank, incorporated under the laws of the State of Louisiana, became insolvent, and the Attorney-General of the State, in 1868, proceeded in a State court at the instance and by request of the bank, and thereupon a decree was rendered forfeiting its charter, and directing its affairs to be wound up in accordance with the insolvent laws of the State. In 1869, creditors of the bank petitioned to have its assets surrendered and administered upon in bankruptcy, and were opposed by the State Insolvent Commissioners. *Held*, the State court had no jurisdiction in the premises

except to the extent of decreeing a forfeiture of the bank charter, when its jurisdiction ended. *Thornhill & Williams et al.* v. *Bank of Louisiana*, 435.

2. The fact that the bank was extinct, as a corporation, and its assets being administered upon under decree of the State court, and according to State laws, at the time of creditors filing said petition in bankruptcy, does not affect the jurisdiction of the United States Bankruptcy Court, and it will lay hold of the assets of the bank, in whosoever hands they may be, and distribute the same in accordance with the provisions of the Bankruptcy Act. *Id.*, 435.

COSTS.

1. Where the petitioner, a creditor of bankrupt, employs counsel, and incurs expenses by which all the creditors are benefited, asks that such expenses and counsel fees be defrayed out of the funds in the hands of assignee, *Held*, that all reasonable expenses be allowed. *New York Mail Steamship Co.*, 627.
2. On revision of charges in the assignee's bill of costs, *Held*, charges for expenses of publishing notice of appointment, advertising sale of property, recording deed of assignment, stationery, etc., are proper. Exceptions overruled.
3. Charge for making deed of conveyance is unauthorized.
4. Charge for counsel fee of twenty-five dollars suspended.
5. Charges for specific acts, such as drafting notice and acceptance of appointment, petition for order of sale, setting aside certificate of exempted property, are unauthorized; but the acts may be compensated as for general services by reasonable allowance, in the discretion of the court.
6. Suspended items referred to Register to take testimony and decide, in his discretion, on their allowance in proper and reasonable amounts. *Riley Tulley*, 82.
7. Assignee has no authority to make specific charges for making and setting aside certificate of exempted property; drafting acceptance and notice of appointment for publication; drafting petition for sale of property, or drafting application for order of compromise. For such acts and services the court may allow reasonable compensation in its discretion, and allows ten dollars therefor.
8. A charge of court fees in drafting an order of compromise is correct, if fees were actually paid.
9. A charge of eight dollars for one day's service in preparing advertisements is disallowed as unauthorized. A fee of three dollars allowed.
10. A charge of seven dollars for one day's service by assignee in ascertaining value of property, allowed.
11. Charge of five dollars for writing and delivering deed, disallowed as improper.
12. An assignee has a right to seek professional advice and to employ counsel in necessary and proper cases. Charge of seventy-five dollars for counsel fees in simply compromising an inconsiderable debt with a lien creditor, under an order of court, questioned and suspended. Referee ordered to take testimony.

18. Assignee can only properly charge commission on the amount of debt canceled by compromise with a lien-holder. *Davenport*, 77.

14. On bill of expenses and charges rendered by an assignee,

Held, Specific charges by an assignee are unauthorized for (1) Drafting certificate of exempted property; (2) Drafting petition for sale of property, and (3) Drafting acceptance of notice of appointment. A reasonable amount for the several acts done may be allowed in the compensation for general services of the assignee. Amount of five dollars allowed.

15. Charges for publishing notice of appointment, advertising, and posting hand-bills. Correct and allowed.

16. Charge of forty-two dollars for six days' services in collecting notes and accounts considered extravagant, though entitled to a reasonable amount. Suspended.

17. A charge for recording assignment is correct.

18. Three items for different days' services, at seven dollars per day; attending sale of land, traveling, and examining titles. Suspended.

19. A charge of fourteen dollars for two days' services in examining papers, allowed, provided the services were actual, and not constructive, and no charges shall have been for same time in other cases.

20. Charge for stationery, postage, etc., allowed.

21. Specific charges for one day's service in making out report, and another day's service in making application to court for order of sale, disallowed as unauthorized and excessive. As general services, seven dollars allowed for said acts.

22. Charge for services of auctioneer disallowed. Assignee must act as salesman, unless leave of court in necessary cases is previously obtained to employ an auctioneer.

23. Commission of five per cent. allowed.

24. Charge of twenty-five dollars counsel fee suspended.

Suspended items referred to Register to take testimony, and to allow proper amounts in his discretion; if his decision is objected to, the testimony and objections to be certified for revision by the court. *Pegues*, 80.

25. Dividend was ordered on claims of certain lawyers for alleged professional services rendered bankrupt.

Held, reference ordered to Register to examine into the proof of such debts, and the Register and assignee restrained from further proceedings until further order of the court. *New York Mail Steamship Co.*, 280.

26. Among the costs taxed against a creditor who was unsuccessful in opposing bankrupt's discharge, were charges of five dollars for recording minutes of testimony of an examination of the bankrupt before the Register, before such creditor filed specifications opposing discharge, and ten dollars counsel fee. To both items creditor objected.

Held, the cost of such an examination must be paid to the Register by the party, creditor, or assignee, applying for it. Charge disallowed, as improperly taxed in this proceeding. *Eidom*, 160.

27. Petition of creditor in involuntary bankruptcy was dismissed, and he was taxed with costs by the Register, from which he appealed.

Held, the several items complained of were properly allowed, except item

of ten hundred and seven dollars and fifty cents, allowed marshal for keeper's fees, which is suspended for further evidence of actual payment. *Lowenstein*, 268.

28. Affidavit of marshal in a case that the expenses were necessarily incurred by him, and are just and reasonable, is insufficient. He must state, in addition, that they were actually incurred and paid. *Lowenstein*, 269.

29. Where a creditor, who is also the assignee in bankruptcy, having employed counsel in proceedings before the adjudication, asks Register for an order for payment of the same by him, as assignee, in the ordinary distribution of bankrupt's estate,

Held, the Register cannot entertain the application in the first instance. There must be a petition to the court by the party, setting out the facts, and asking the relief desired. *Dibblee et al.*, 754.

30. Rule as to the legal rate of charges for printing advertisements of sale of real estate by order of the court. *Downing*, 741.

31. See PETITIONING CREDITOR.

COUNSEL FEE.

1. Counsel of bankrupt is entitled to be paid out of the bankrupt estate for services rendered in preserving the estate for the assignee. *In re Montgomery*, 137.

2. Where a creditor opposes discharge of a bankrupt, a case is created for trial in the court docket, and the counsel fee is allowed as a proper charge. *Eidom*, 160.

3. Attorneys for bankrupt applied to the Register for an order for the payment by the assignee, out of the assets, of a sworn bill of items of disbursements by them, of one hundred and thirty-seven dollars and sixty cents, on account of clerk's, register's, and marshal's fees, for printing in the case, to which the assignee objected that the bankrupt had paid his said attorneys five hundred dollars for their services in the case, which was intended and fully sufficient to cover all expenses. The Register certified the question of payment of the bill to the court.

Held, that the proper way to bring the matter before the court was by petition, either by the assignee or bankrupt's attorneys, and reference would be ordered for taking testimony. *Rosenberg*, 78.

DEBTS.

1. A debt is not so merged in the judgment as to deprive the creditor of the right to prove it. *Brown*, 584.

2. It is not essential that the debt of the petitioning creditor should be *due* at the date of the alleged act of bankruptcy, to enable him to sustain proceedings against the bankrupt. *Phelps* v. *Clasen*, 87.

3. A debt, to be provable in bankruptcy, must continue to exist in the same condition after as at the time of proceedings commenced.

Where a protested note, on which the bankrupt was principal, held by a bank that had discounted it, was taken up by a new note made by the same parties, and accepted by the bank, after adjudication of bankruptcy,

Held, the original debt was thereby extinguished, and the liability ceased

to be a claim on the estate. Proof of a claim based thereon stricken out. *Montgomery*, 426.

4. A judgment for a fine imposed as a penalty for crime is not a debt within the meaning of the Bankrupt Act, and not being included in the special provisions, allowing certain claims to be proved as debts, it cannot be proved against the estate of a bankrupt. *Sutherland*, 314.

5. Creditor upon a note of which slaves were part consideration, filed petition in involuntary bankruptcy against a farmer, charging him with having made fraudulent preferences, being insolvent.

Held, a note made prior to the Emancipation Proclamation, of which slaves were a consideration, is valid, and the debt will support a petition of creditor in bankruptcy. *Miller* v. *Keys*, 225.

6. That portion of the law of Maine relative to the sale of intoxicating liquors, which debars a creditor from maintaining a suit for liquors purchased without the State, with intent to sell the same in violation of the provisions of said act, does not prevent proof of such claim in bankruptcy against the estate of a bankrupt residing in said State, if such contract is valid at the place where made. *Murray*, 765.

DISCHARGE.

1. A discharge will not be refused simply for the claim that publication of the notice of the assignee's appointment was omitted to be made. *Strachan*, 601.

2. The buying of goods fraudulently, or when the debtor knew that he could not pay for them, is not a fraud which will prevent the discharge of a bankrupt. *Rogers*, 564.

3. Any creditor who has a provable debt may oppose the bankrupt's discharge. *Murdock*, 146.

4. That an assignment would be an act of bankruptcy under the 39th Section of the Bankrupt Law, if adversary proceedings were instituted within six months, does not make it, in the absence of actual fraud, a bar to a discharge, under the 29th Section. *Pierce & Holbrook*, 258.

5. The debtor may obtain his discharge, although the publication of the notice of the appointment of the assignee has been made three times in the course of two weeks, instead of once a week for three successive weeks, as required by the act.

6. The debtor may also obtain his discharge, notwithstanding that the second and third meetings are not held at the expiration of three and six months respectively, from the date of the adjudication.

It is the duty of the debtor to be ready for examination upon due notice, but he need not notify the creditor when and where the examination is to be had. *Littlefield*, 57.

7. A firm, M., W., R. & Co., duly appointed B. & C. their attorneys, and proved debt in bankruptcy. Thereafter S. & H., a law firm, duly entered appearance for W., R. & Co., creditors, and filed specifications in opposition to bankrupt's discharge, signed (in the handwriting of S.) B. & C., and S. & H. attorneys for the opposing creditors. W., R. & Co, had proved no debt.

Held, the objecting creditors had no status on which to oppose discharge. S. & H. had no power to act for M., R. & Co. and the firm of W., W., R. & Co. had proved no debt. *Palmer*, 301.

8. The petition of the bankrupt was filed May 19, 1868. In January of that year he conveyed two parcels of land, and a fractional share in three several schooners, to his wife.

Held, that the conveyances were made after his insolvency became known to him, that he thereby committed a fraud upon the act, and that his discharge must be refused. *Adams*, 561.

9. It is no ground of objection to the discharge of the bankrupt that he caused and permitted the loss, waste, and destruction of his estate and effects, and misspent and misused the same, unless such loss, etc., occurred after the filing of the petition. *Rogers*, 564.

10. Individual creditors of members of a firm duly adjudged bankrupts on petition of one of the firm, applied to the court to set aside the adjudication, because of absence of certain jurisdictional averments in the petition.

Held, the questions involved in such application can properly be raised only by the creditors opposing the bankrupt's application for discharge, at the proper time.

11. Want of jurisdiction is good ground to refuse a discharge.—A discharge granted without jurisdiction is no discharge. *Penn*, 582.

12. Where bankrupt had omitted to include in Schedule B. statement of an interest in an estate in expectancy under a will,

Held, discharge must be denied until the same be amended, for which leave is granted, with reference to the Register for that purpose. *Connell*, 443.

13. If the court, upon examining the record upon an application for a final discharge, perceives that the bankrupt has done any act which under the statute would be a bar to the granting of a certificate, it will refuse to make the order for a discharge, although no creditors appear in opposition. A decree or judgment of the court during the progress of the cause, determining that the bankrupt has done any act which would prevent the discharge, will operate as an estoppel. In some cases the party may be allowed to explain an act, and to show that while it was fraudulent in law it was not so in intent. *Sohoo*, 215.

14. A discharge will not be withheld when it appears solely from the bankrupt's examination that he had paid certain debts in full, a short time before he became bankrupt, no other proof being offered to show such payments were fraudulent preferences. *Burgess*, 196.

15. An assignment for the benefit of creditors, without any preference, sixteen days before the filing of the debtor's petition in bankruptcy, and when a creditor proceeding adversarily was about to obtain a judgment,

Held, not to preclude the discharge of the bankrupt.

Such an assignment, though voidable by the assignee in bankruptcy, is not void. *Pierce & Holbrook*, 258.

16. Neither the actual nor alleged residence or place of business of the bankrupt can be directly made the ground of opposition to his discharge. *Burk*, 296.

17. When application is made by a bankrupt for his discharge, after the expiration of a year from the adjudication of bankruptcy, it is discretionary with the court to grant or withhold the discharge, according to the circumstances of such case. The discharge after the year not to be granted,

as a matter of course; but the bankrupt may be permitted, by affidavit, petition, or otherwise, to explain in writing the causes of the delay. *Cnady*, 111.

18. Where there was no opposition to the discharge of an involuntary bankrupt, the question of competency to grant a discharge in such case, was certified for decision by the court.

Held, that in a proper case an involuntary bankrupt might be granted a discharge. *Clark*, 16,

19. The provision in the 34th Section of the Bankrupt Law, making the certificate of a bankrupt's discharge conclusive, and allowing an application within two years, in the United States District Court, to annul it, does not cut off a creditor from setting up a fraudulent concealment by the bankrupt of his property against his certificate of discharge, in whatever court he may plead it. *Perkins* v. *Gay*, 772.

20. Where eleven objections to a discharge were filed and pressed by opposing creditors, and under each an issue of fact was raised, and evidence and argument submitted,

Held, the opposing creditors having established a *prima facie* case of fraud, the petitioner is not entitled to his discharge. *Doyle*, 782.

See BANKRUPT, *Doyle*, 640.

DISMISSAL PROCEEDINGS.

1. If the petitioning creditor in a case of involuntary bankruptcy desires to discontinue proceedings, and have his petition dismissed, he may do so before adjudication, without giving notice to other creditors of the alleged bankrupt. *Camden Rolling Mill Co.*, 590.

2. Until adjudication, the only parties to the proceedings are the petitioning creditors and the debtor. The other creditors must file a new petition, or petition to be substituted under the last clause of the 42d Section of the Bankrupt Act. *Id.*

3. Any creditor wishing to be so substituted must appear on the day to which proceedings have been adjourned, and on that day petition to be substituted. *Id.*

4. When on such adjourned day the petitioning creditor does not "appear and proceed," and the understanding with the debtor is that such failure to appear shall be equivalent to a dismissal, and no other creditor appears to be substituted, the proceedings are at an end. *Id.*

DISTRIBUTION.

1. Neither local inclinations, nor the employment of the process of State courts can longer be successfully employed to thwart or defeat the equal distribution of an insolvent debtor's estate among all his creditors, regardless of their locality. *J. R. McDonough, Assignee*, v. *Raftery*, 221.

2. In the distribution of the assets of the bankrupt derived from the collection of a promissory note, a creditor whose claim is in judgment has no priority, and will share *pro rata* with the other creditors. *Hardee*, 580.

DIVIDENDS.

1. In the settlement of insolvent estates, equity allows the creditor to prove

and take a dividend on his whole debt, without regard to any collateral security he may hold.

R., being insolvent, assigned all his property to the defendants "in trust, to convert the same into money, and divide the same equally among all of his creditors, in proportion to the amounts owing by him to them respectively." The property was only sufficient to pay about thirty-five cents on the dollar. The plaintiffs were creditors of R., and held stocks which he had pledged to them, amounting in value to about twenty per cent. of R.'s indebtedness to them.

Held, that the plaintiffs were entitled to a dividend upon the whole amount of their debt, without regard to the stocks pledged. *Jervis* v. *Smith*, 594.

2. Motion to vacate an order for a dividend may be made on proper papers and notice. *New York Mail Steamship Co.*, 280.

DOWER.

Wife of bankrupt not entitled to claim dower out of lands owned by bankrupt when he filed his petition in bankruptcy—the bankrupt being still alive. *Kelly* v. *Strange*, 8.

EQUITY, PROCEEDINGS IN.

1. The rule, that one having a lien upon two funds must so act as not to disappoint the just expectations of another having a lien on one of them only, is founded in social duty, and is never enforced to the prejudice of the double fund creditor.

2. Equity does not, upon the maxim that "equality is equity," deprive creditors of the fruits of diligence, but it favors and rewards diligence, and gives to creditors their full legal rights. And it does not treat those rights as varied by the accidents of insolvency, or of death. *Jervis* v. *Smith*, 594.

3. It is not the duty of an assignee to petition the court respecting the sale of encumbered property of bankrupt, unless he believes such sale will produce a larger fund for the general creditors whom he represents.

Assignee may sell encumbered property in his possession without petitioning the court, or without an order of the court, but in so doing he sells subject to lawful encumbrances. He can convey no higher or better interest than he took. *Mebane*, 347.

EVIDENCE.

1. The doctrine may be taken as established, that whether the instrument relied on be signed by one only, or by both parties to it, it does not exclude parol proof of a consideration for the signature of one of the parties, additional to, and differing from, the one which it recites, unless it appears that it was the intention of the parties to state in such instrument all the consideration for such signing.

2. When parties have attempted to put their agreement in writing on any particular subject, and have expressed any clear meaning, parol testimony cannot be received to contradict or vary that meaning.

3. Where they have used language which, when considered in the light of all the circumstances attending the transaction, is incapable of conveying any satisfactory meaning, parol testimony cannot be admitted to state, in terms, what was the meaning intended.

4. But it is not inconsistent with either of these propositions, that parol proof may be received, of any or all the circumstances surrounding and accompanying the transaction, tending to show the relation of the parties to each other, and to the subject-matter of the contract, and the state or condition of that subject-matter, as bearing on the intention of the parties.

5. In construing a clause of a contract, by which one partner selling his interest in the firm to the other, it is agreed that the sale is subject to the indebtedness of the old firm, it is admissible to show that there were no liens on the goods of the firm for such indebtedness; that the parties well knew this, that the value of this interest of the retiring partner was three times the money paid him, and recited in the instrument of sale as the consideration; and any other matter of this character, calculated to enlighten the court as to the true intent of the parties. *Phelps* v. *Clasen*, 87.

6. Where a creditor has been preferred by bankrupt, it may not be necessary to show such creditor's fraudulent collusion in order to prevent a discharge. *Burgess*, 196.

7. Where a creditor has before him what the statute declares shall be *prima facie* evidence of fraud, he must, in law, be deemed to have reasonable cause to believe the existence of such fraud, until the legal presumption is overborne by opposing evidence. *Kingsbury et al.*, 818.

8. A creditor on information alleged to have been acquired after bankrupt's discharge, applied to have the discharge annulled for fraud, in the bankrupt concealing property from his creditors.

Held, the allegations being unsupported by sufficient evidence, the objections to the discharge fail, and creditor's petition dismissed with costs. *Stetson*, 726.

EXAMINATION.

1. A witness cannot refuse to answer questions concerning his dealings, etc., with the bankrupt, on the ground that his answer may furnish evidence against him in a civil case, brought or to be brought on behalf of the assignee. *G. P. & B. W. Fay*, 660.

2. Where counsel of creditor put questions to bankrupt upon his examination, touching property of his wife, and his own acts in relation thereto, bankrupt objected that the questions related to matters existing and transpiring prior to the time when the creditor's debt was contracted, and declined to answer unless compelled.

Held, That the questions were proper, and bankrupt should answer. *Craig*, 100.

3. Where bankrupt is upon his examination, and fails to answer proper questions propounded, he will be compelled to answer by the court. *Holt*, 241.

4. Bankrupt was under examination by his assignee, and refused to answer certain questions touching his acquirement and possession of considerable amounts of money after proceedings in bankruptcy.

5. *Held*, the questions were proper and relevant as directed to the point of inquiry, when and how did the bankrupt acquire the same, and must be answered. *McBrien*, 844.

6. Where a sum of money, and sundry articles of jewelry in the possession of one of the bankrupts were refused delivery to the marshal upon his making demand for same, and a motion is made for the examination of said bankrupt, to show what he had done with said property, the bankrupt's plea was, that reasonable time had not been allowed him.

Held, the defendant is liable to examination after due service of copies of the petition, and the orders in the case, although final adjudication had not been had.

7. The defendant being before the court on his own behalf, he was *at that time* liable to examination without other notice, his plea of want of reasonable notice cannot be entertained.

8. The defendant cannot claim the protection of the court, on the ground that if he answers questions as to what he had done with said personal property he will criminate himself, etc. *Bromley*, 686.

9. In the examination of a witness the Register has no power to decide on the materiality or relevancy of questions. *In re* S. M. & M. Levy, 1 N. B. R., 105. *Bond*, 7.

EXEMPTION.

Where assignee had allowed the two members of a bankrupt firm an exemption under the laws of Missouri, of one hundred and fifty dollars each, out of partnership assets, there being no individual assets, Register disallowed the same, and on application of bankrupt's attorney, certified facts for opinion of the court.

Held, the bankrupts were entitled to the exemption out of partnership assets. *Young & Young*, 440.

EXEMPTED PROPERTY.

1. Under Section 14 of the Bankrupt Law, household and kitchen furniture and other articles and necessaries to the amount of five hundred dollars may be set apart.

2. The discretion of the assignee limited to the "other articles and necessaries." Rule for exercising such discretion laid down.

3. Property of the value of three hundred dollars exempted under the laws of the State; but such exemption cannot include the same species of property as are named in the Bankrupt Law.

4. The State exemption must be ascertained by the mode designated by the State Law. *Feely*, 66.

FIFTY PER CENT.

1. Where a voluntary bankrupt, after January 1, 1869, applied to the court upon his petition and schedule, before the day of first meeting of creditors, to have his assets appraised and determined as being in excess of fifty per cent. of provable claims, etc.,

Held, the application must be denied, no debts appearing to have been proved, and no present action of the kind asked could affect the question of the bankrupt's discharge. *Frederick*, 465.

2. To entitle a bankrupt to discharge, the proceeds of his property to be divided among his creditors must be equal to fifty per cent. at the time of the hearing of the application for the discharge before the Register. *Webb*, 720.

FIRST MEETING OF CREDITORS.

Where the claim of a creditor, at first meeting, is postponed by the Register, and again presented after the election of assignee,

Held, that the proof of claim must be treated in all respects as if it had not been before tendered. *Herrman & Herrman*, 649.

See ADJOURNMENT, *Schepeler et al.*, 170.

FORECLOSURE.

A creditor of a bankrupt holding security by mortgage or deed of trust cannot enforce his security after the commencement of proceedings in bankruptcy until he first prove his debt and receive permission of the court. If he proceed without authority of court the sale will be invalid, and will be set aside, or upon application for good cause the court may confirm the sale upon terms after the debt is properly proved. *John R. Lee, Assignee*, v. *Germ. Savings Institution*, 218.

FRAUD.

Where it appeared to the court from the facts shown by the evidence taken on a reference, had on a petition of a supposed creditor that certain claims of other creditors be disallowed and rejected, that he had purchased claims against the bankrupts to prove as a creditor, while he was, in fact, acting in their interest,

Held, all proofs of claims by him, or of claims purchased by him, should be stricken out. A reference will be ordered by the court without any application therefor, by which to ascertain such claims. *Lathrop et al.*, 410.

FRAUDULENT CONVEYANCE.

1. Property which had been conveyed by a bankrupt in fraud of creditors prior to the passage of the Bankrupt Law, is to be regarded as vested in the assignee in bankruptcy, by force of that act, and by virtue of the proceedings thereunder. *Goodwin* v. *Sharkey*, 558.
2. Under the Bankrupt Act, an assignment, whether the assignor be solvent or insolvent, with intent to delay, hinder, or defraud his creditors is an act of bankruptcy. *Randall*, 18.

3. See PLEADING, *Broome*, 343.

FRAUDULENT PREFERENCE.

1. Where a bankrupt transfers his stock and book accounts in satisfaction of a pre-existing debt to a creditor who threatened to attach his stock and break up his business, such a conveyance is a preference under the Bankrupt Law, though made under pressure. *Batchelder*, 150.
2. The clause of the 39th Section concerning any pledge, payment, conveyance, etc., of property, does not include consignments which do not change the title. But the allegation that goods were consigned to parties outside of the district in contemplation of bankruptcy, is sufficient as a charge of a removal from the district, and if done with a view of

becoming bankrupt, and with the intent of keeping such goods from the assignee, is a sufficient charge that it was done to defraud creditors. *Hammond* v. *Coolidge*, 273.

3. A, B & Co., creditors, after having received information of the insolvency of C, accepted a chattel mortgage on his stock, subject to a prior mortgage and possession of D, another creditor. The evidence showed that C was insolvent, as represented to A, B & Co. C having been adjudged bankrupt, it was *Held*, that A, B & Co's mortgage was fraudulent, and could not be paid out of the sale of the goods it purported to convey. *Palmer*, 283.

4. A firm had notes past due and falling due without available means to meet them, and obtained loans for the purpose from parties liable on certain of the firm notes and private notes of the members, giving two new notes for the loans so obtained, and securing payment thereof by executing a mortgage of all the firm property. The firm was subsequently adjudged bankrupt on the petition of a creditor in involuntary bankruptcy, and assignee in bankruptcy brought action in equity to set aside said mortgage as constituting a fraudulent preference under Section 35 of the Bankrupt Act. The mortgagees swore that they believed the firm to be solvent at the time such mortgage was executed, and a member of the firm swore that he believed the same, and had not then contemplated insolvency or bankruptcy.

Held, the firm was actually insolvent when the said mortgage was executed, and the mortgagees had reasonable cause so to believe it, and it operated to give such preference. The mortgage must, accordingly, be set aside as void. *Scammon* v. *Cole*, 393.

5. Where defendant had indorsed the note of Sugarman & Frank, payable to the order of himself, which was discounted at the bank of Espy, Heidelbach & Co., and seven days before the same became due by its terms, the defendant received from Sugarman & Frank, who were then insolvent, bills and drafts, with instructions to apply them to the payment of the note held by Espy, Heidelbach & Co., and the same were accepted by those bankers as payment of the said note, which was taken up and canceled; *Held*, 1st, as Espy, Heidelbach & Co. were not apprised of the insolvency of Sugarman & Frank, that the payment to them was not a preference in fraud of the law; 2d, that they were not the parties benefited by the payment, as the defendant, being solvent, his indorsement made them wholly safe; 3d, that the defendant was the person "to be benefited by the payment," whether made before or after maturity of the note, and that he, having reasonable cause to believe them insolvent at the time of such payment, any appropriation of their means to pay or indemnify him is condemned by the statute, and that defendant was liable to the assignees of the bankrupts for the amount paid by him to Espy, Heidelbach & Co. *Buchman* v. *Thorner*, 118.

6. To constitute a fraudulent preference where the alleged bankrupt is claimed to be insolvent, he must so be, and know himself so to be, and actually intend and actually give a preference to a creditor. *Miller* v. *Keys*, 225.

7. A creditor who had received a conveyance of property made with intent to defeat or delay the operation of the Bankrupt Act, having reasonable cause to believe a fraud on the Bankrupt Act was intended, cannot prove his claim and vote for assignee. *Chamberlain*, 710.

FRAUDULENT SUSPENSION.

1. *Held*, that the words "fourteen days," as used in the 39th Section of the Bankrupt Act, do not necessarily apply to the case of a *fraudulent* stoppage of the payment of commercial paper. *Thompson & McClallen*, 184.

2. A trader gave promissory notes in part payment of purchases of goods, and before they fell due, sold out the balance of his stock in gross, without invoice, at ten o'clock at night, to a purchaser for ten hundred and thirty-two dollars cash, and went out of business, after paying one of the notes before maturity. He failed to pay the other notes at maturity, and they remained unpaid for more than fourteen days.

Held, it was no defense that the debtor had ceased to be a trader at the period of suspension. The sale for cash was not a sale made in the ordinary course of business. The suspension of payment of his paper was fraudulent, and he must be adjudicated a bankrupt. *Davis* v. *Armstrong*, 33.

3. If a debtor is guilty of fraudulently suspending the payment of his commercial paper, proceedings may be immediately taken by his creditors to have him adjudged a bankrupt without waiting for the lapse of fourteen days. The Bankrupt Act, Section 39, provides for two classes of cases—a fraudulent suspension, and a suspension of payment for fourteen days without resumption—for either of which a merchant or trader may be adjudged a bankrupt. *Sohoo*, 216.

4. On mere proof that a trader, within six months before a petition in bankruptcy was filed against him, failed to pay his commercial paper for fourteen days, and did not resume payment thereof till such petition was filed, the *prima facie* presumption is that such failure was fraudulent; and such proof casts on him the burden of rebutting that presumption of fraud by satisfactory evidence. *Heinsheimer et al.* v. *Shea & Boyle*, 187.

HABEAS CORPUS.

1. Where bankrupts were under arrest by the sheriff upon process of State court,

It was, on *habeas corpus*, *Held*, that the United States District Judge cannot in such case properly inquire into the fact whether the debt or claim upon which the order of arrest was founded was or was not one from which the bankrupts could be discharged by a discharge in bankruptcy, or whether the bankrupts were liable by the State law to arrest; but he has solely to determine whether the State court, in its order of arrest, intended to found it on a claim or debt not dischargeable in bankruptcy.

2. It being determined from an examination of the plaintiff's affidavit, on which the order of arrest was founded, that the court had so intended,

Held, the prisoners should be remanded to the custody of the sheriff. *Valk*, 278.

HOMESTEAD.

1. Where bankrupt, residing in Georgia, rented a house, hired servants, and made his home therein with a widow not related by blood to him, but whom he and his wife had educated and regarded as their adopted daughter, but had failed to adopt her in accordance with law,

Held, that he is head of a family, and entitled to exemption as such of fifty acres of land as a homestead, but is not entitled to five acres additional for each of three children of the widow residing with them, and forming part of the household, inasmuch as he is not legally bound to support them. *Taylor*, 158.

2. The wife of a voluntary bankrupt in Georgia sought to have set apart out of his real estate the homestead provided by the State laws of 1868, filing her petition therefor with the State officer on the same day her husband petitioned in bankruptcy, and proceedings in setting it apart concluded on the day before the husband was adjudicated a bankrupt.

Held, the exemptions authorized by Section 14 are limited to those established by the State laws in existence in 1864, and cannot be extended to exemptions granted by State laws enacted subsequently. The Bankruptcy Court acquired exclusive jurisdiction of the bankrupt and his estate, on the filing of his petition in bankruptcy. The Ordinary was without jurisdiction in setting apart the homestead, and his action therein declared null and void. *Askew*, 575.

3. An unmarried man, a bankrupt, having orphan children bound to him under the apprentice laws of Texas, and keeping house, hiring servants, and conducting a household, claimed a homestead of one hundred acres, as head of a family, by the laws of Texas. The assignee set apart the same, but afterwards made a motion to have the award set aside as unauthorized.

Held, that the bankrupt was not entitled to such homestead as head of a family.

Amount thereof set aside, and fifty acres ordered to be set apart to him as a citizen, under the Texas laws, not to exceed in value five hundred dollars. *Summers*, 84.

The bankrupt is entitled to the exemption of a homestead out of land mortgaged by him, to secure the payment of borrowed money, prior to the time of claiming such homestead. *Brown*, 250.

HUSBAND AND WIFE.

1. In Mississippi, husband gave promissory note to the trustee of wife, for alleged balance on account stated between them, growing out of the use of the separate personal and real property of the wife, and executed a deed of trust on certain land of the husband to secure payment of the note, and subsequently went into voluntary bankruptcy. On petition of assignee and a secured creditor,

Held, the said conveyance must be held to be fraudulent and void as to existing creditors at the time it was made. *Gillespie* v. *Knight*, 468.

2. Mrs. Russell, a married woman, carried on, managed, and controlled an

iron foundry and other business interests in her own name, with funds loaned her by friends to whom she gave her own notes, with whom she advised as well as with her husband as to proposed investments. The husband, who was insolvent, was hired by the wife, and received a monthly compensation. *Held*, that the property used in the business and that purchased by her and standing in her name, was her individual property, and not liable to be taken to satisfy the claims of her husband's creditors.

Held, that a married woman may carry on business on her own account and for her own interest; that she may employ all needed labor, workmen, and agents, and that she may employ *her own husband and pay him*. *Russell* v. *Russell*, 161.

3. An opposing creditor to discharge of bankrupt in Illinois, charged substantially that he had covered up property in his wife's name.

Held, under the State statute a married woman is entitled to all she obtains from a source independent of her husband, but a man in embarrassed circumstances and insolvent, cannot make use of his wife, directly or indirectly, to cover up from his creditors any of his property, or any of his earnings or his skill. *Eldred*, 256.

4. Whether a married woman may prove against the estate of a bankrupt firm, of which her husband was a member, the amount of a promissory note given by the firm to him for his contribution to capital stock—the money having been furnished by her, and the note transferred to her soon after its execution,

Held, the note was not an evidence of debt against the firm, but against her husband only. She may prove as against her husband and participate in the dividends of his individual estate, but not against the partnership estate. *Frost & Westfall*, 736.

5. See AGENT, *Graham* v. *Stark*, 357.

INDORSER.

1. A second indorser might prove his claim on an original note, before extinguishment, by way of security against the irresponsibility of any one personally liable thereon, but he could receive dividends only on the amount thereof which he could show that he had personally paid. *Montgomery*, 426.

2. Held, that although the term indorser is not specially used in the 35th Section of the Bankrupt Act, that it was the intention of the law to make any payment or preference to an indorser or other surety fraudulent and void where the other elements in the transaction existed to give it that character. *Buchman* v. *Thorner*, 118.

3. Liability as indorser upon a promissory note was fixed upon N., against whom the holder, as creditor, filed a petition in involuntary bankruptcy, charging the commission of certain acts of bankruptcy.

Held, when an indorser's liability has become fixed, such liability constitutes a debt due and payable from the indorser, and may be made the foundation of involuntary as well as of voluntary proceedings in bankruptcy. *Nickodemus*, 230.

INJUNCTION.

1. When a petition for an injunction against other parties than the debtor is united with a petition in involuntary bankruptcy, the injunction will be only provisional, until the court can act upon the petition to adjudge the debtor a bankrupt, and a bill must then be filed to secure the relief sought against parties other than the bankrupt. *Kintzing*, 217.

2. Where an injunction had been issued under the act by the District Court, staying proceedings against bankrupt in the State courts until the question of final discharge should be determined, and final discharge was granted and motion made to dissolve said injunction,

Held, that the motion was unnecessary, as the order for the final discharge terminated the injunction. *Thomas*, 38.

3. Injunctions in bankruptcy, under Section 40 of the act, may be allowed and issued without notice, but the court may require notice to be given. *Muller & Brentano*, 329.

INSOLVENCY.

1. A merchant is insolvent when he cannot pay his debts in full *as they become due*, and out of whose property they cannot be collected by legal process. *Randall & Sunderland*, 23.

2. When a man's property is taken on legal process against him, that if all his property were sold, and would not produce money enough to pay his debts, he is insolvent within the meaning of the law.

A solvent man is one that is able to pay all his debts in full as they become due. *Wells*, 371.

3. If a man's debts cannot be made in full out of his property by levy and sale on execution, he is insolvent within the primary and ordinary meaning of the word, and particularly in the sense in which the word is used in the Bankrupt Act. *Randall & Sunderland*, 18.

4. See BURDEN OF PROOF.

INSOLVENT LAWS.

1. The insolvent laws of the commonwealth were not superseded until June 1, 1867, by the United States Bankrupt Law, approved by the President, March 2, 1867, U. S. St., 1867, C. 176. *Day* v. *Bardwell et al.*, 455.

2. The primary object of civil proceeding under the Stillwell Act is, not the punishment of the debtor, but the collection of the creditor's judgment; and therefore such proceedings are in direct conflict with the Bankrupt Law, as respects all property which passed to the assignee in bankruptcy. *Goodwin* v. *Sharkey*, 558.

INTENT.

1. An insolvent debt or executed two chattel mortgages to secure pre-existing debts, and afterwards made a general assignment without preferences, for the benefit of all his creditors.

In his answer to petition against him in involuntary bankruptcy, he denied having committed an act of bankruptcy, and denied that he knew or believed himself insolvent when he executed the said mortgages, though he made admissions in such answer that showed that he was legally insolv-

ent, and that he knew the facts upon which the law adjudged him insolvent.

Held, such debtor is conclusively presumed to have intended the necessary effects of such general assignment, which would be to defeat provisions of the Bankruptcy Act. In making such general assignment he therefore committed an act of bankruptcy. *Smith*, 378.

2. That it is to no purpose that a man says, when he is insolvent and signs a note and warrant of attorney and gives it to his creditor, the effect of which is to enable that creditor to enter up judgment and levy on his property, that he did not intend to give a preference. *Campbell, Assignee,* v. *Traders' National Bank*, 498.

3. A creditor, ignorant of his legal rights, will not be held, in the absence of proof of fraud, to intend what his acts imply, particularly if such creditor be acting in a fiduciary capacity. *Brand*, 324.

4. It is *the character of the instrument* which is the subject of discussion; and if the exercise of the powers granted by it would defeat or delay the operation of the Bankrupt Act, then such would be presumed to have been its intention. *Chamberlain*, 710.

INVOLUNTARY BANKRUPTCY.

1. Provisions of Section 39 relate exclusively to proceedings in involuntary bankruptcy. *Evans*, 261.

2. In a proper case may receive a discharge. *Clark*, 16

JUDGMENT.

1. The provision in the United States Bankrupt Act, U. S. St. of 1867, C 176, Section 14, that an assignment under the act shall vest in the assignee the title to all the bankrupt's property, "although the same is then attached on mesne process," and "shall dissolve any such attachment made within four months next preceding the commencement of said proceedings" in bankruptcy, does not prevent the enforcement of a judgment against the bankrupt on a portion of his property attached in the action more than four months before he commenced proceedings in bankruptcy *Bates* v. *Tappan*, 647.

2. L. C., a creditor, recovered two judgments, in a County Court of North Carolina, against a debtor, executions on which judgments were enjoined by the United States Military Commandant. The injunction was thereafter rescinded, and *fieri facias* were filed, but never delivered to or acted on by the sheriff. Subsequently two other judgments against said debtor were respectively obtained by R. T. and De V. & G., creditors, upon which executions issued, and property of debtor was levied on by the sheriff, before proceedings commenced in bankruptcy. Debtor thereafter was adjudged bankrupt, and assignee was appointed, who agreed with the sheriff that the property so levied on should be offered and sold by the assignee, free from all encumbrances, on account of said executions and levies, and it was sold accordingly.

Held, that L. C., the senior judgment creditor, is not entitled to any of the

proceeds of said sale, as he had not perfected lien prior to proceedings commenced in bankruptcy.

3. The action of the United States military officer preventing him from issuing executions, does not help or cure the defect.

4. The junior judgment creditors are entitled to have their claims paid *pro rata* by the assignee out of said proceeds, after deducting expenses, costs, and fees of sheriff and assignee, and this by virtue solely of said agreement. *Mebane*, 347.

5. No lien is obtained on equitable interests by judgment and execution alone, when creditors took no proceedings to reach such equitable interest, or establish an equitable lien. *Hinds*, 351.

6. A creditor may prove a claim based on a debt existing at the time of proceedings commenced in bankruptcy, notwithstanding he may in a suit to recover the same have obtained judgment thereafter. *Brown*, 584.

7. Where judgment is rendered on a debt after petition filed in bankruptcy but prior to the adjudication, the debt is not so merged in the judgment, as to render it incapable of proof. *Vickery*, 696.

8. Is a simple contract debt existing at and before the filing of the petition for adjudication of bankruptcy, on which a judgment has been rendered *after* such filing, the same debt within the meaning of the several provisions of the Bankrupt Act, relating to the proof of claims against the estates of bankrupts? *Crawford*, 698.

JURISDICTION.

1. Where, on a summary petition to set aside an alleged fraudulent transfer, the defendant appears, and answers without objection as to the form of proceedings,

2. The court has jurisdiction of the parties in this case under Section 1 of the Bankruptcy Act, no objection thereto having been made in the proper manner or at the proper time. *Ulrich*, 133.

3. Petition of involuntary bankrupt was before the United States Circuit Court to review the decree of United States District Court adjudicating him a bankrupt, and assignee in bankruptcy filed petition for order to enjoin bankrupt from prosecuting certain actions in State court, and for other orders.

Held, motion denied for want of jurisdiction. The powers of the Circuit Court in bankruptcy cases are revisory only, and the proceedings for review bring only the decree and orders involved in it, before the Circuit Court, and do not operate to transfer to it the entire bankruptcy proceedings, to be continued there as a court of first instance. *Clark & Bininger*, 487.

4. A partner brought action in State court against his copartner for a settlement and winding up of the partnership; and receivers were appointed who took possession of the partnership property. The firm, with its partners, was subsequently adjudged bankrupt, on petition of creditors, and assignee in bankruptcy was appointed, who applied and obtained an order from the United States District Court, enjoining the plaintiff to the actions in the State court from further proceedings therein, and that

he execute proper instruments to substitute therein the assignee in bankruptcy. On further application of assignee that an order issue for the marshal to take possession of the joint property from the receivers of the State court, etc.,

Held, no allegation is made impeaching the validity of the transfer to and lawful custody of the joint property by the receivers of the State court, and the Bankruptcy Court has no jurisdiction to grant the particular relief asked. Application denied. *Clark & Bininger*, 524.

5. Mortgagees of certain realty assets of a bankrupt corporation brought suit in State court to foreclose, and made assignee in bankruptcy a defendant. Assignee filed petition in the United States District Court, praying that proceedings in the foreclosure suit be stayed, and that the mortgage be set aside as invalid. Further proceedings were accordingly enjoined, whereupon mortgagees petitioned for review, denying the jurisdiction of the District Court upon the petition of the assignee aforesaid.

Held, that the District Court had jurisdiction under Section 1 of the Bankruptcy Act. *N. Y. Kerosene Co.*, 125.

6. The Bankruptcy Court has full power to order the sale of encumbered assets in such manner as it chooses to direct.

Where assignee has commenced suit in the United States District Court against lien-holders, the Bankruptcy Court ordered the sale jointly by the assignee and the referee, of certain mortgaged property, and the deposit of proceeds in the treasury of the court to await the determination of the suit against the said lien-holders. *Columbian Metal Works*, 75.

7. Chattel mortgagee petitioned to have his mortgage declared a valid and subsisting lien on property of bankrupts, and that the assignee be ordered to surrender to him the mortgaged property. Assignee objected to the jurisdiction of the Bankruptcy Court until the mortgagee should prove his debt against the estate.

Held, the court has concurrent jurisdiction with other tribunals to hear and determine the question of lien in the premises. *High & Hubbard*, 191.

Whether the Bankruptcy Court has power to assume possession and control of property levied on by a sheriff prior to the proceedings in bankruptcy—*quære? Wilbur*, 276.

See CORPORATION, *Thornhill & Williams* v. *State Bank of Louisiana*, 435; and STATE COURT, *Clayton et al.*, 656; APPEAL, *Alexander*, 32.

LEGAL PROCESS.

The taking of property by a receiver appointed by order of a State court, is a taking under legal process, within the meaning of Section 39 of the Bankruptcy Act. *Hardy et al.* v. *Clark & Bininger*, 385.

LIENS.

1. Creditors on a promissory note had judgment, docketed prior to proceedings in bankruptcy, against four bankrupts, as joint debtors, and sought to have it paid out of the proceeds of certain real estate in New York, purchased originally with partnership funds of J. A. and J. N. H., two of said joint debtors, and the legal title of which was in J. N. H., who, however, had

not been served with process, nor appeared in said cause, and against whom there was no judgment on which his individual property could be sold.

Held, said creditors had no valid lien at law on said real estate, nor had they a valid equitable lien on the equitable interest of the partner J. A., by virtue of said judgment. *Hinds*, 351.

2. Creditor had judgment in Georgia against bankrupt in 1858, and sought to prove his claim in bankruptcy.

Held, he was entitled to no priority on account thereof, no entry having been made in the execution for seven consecutive years subsequent to Oct. 4, 1860, and he had no lien by the laws of Georgia. The Bankrupt Law recognizes as liens only those that are valid and binding in the State where the property is situated. *Cozart*, 508.

3. Debtor filed petition in bankruptcy on May 17, 1869, and was thereupon adjudicated bankrupt. On May 29, 1869, claim was for the first time filed under the laws of New Jersey, in respect to mechanics' liens on certain real estate, factory buildings, and fixed machinery in said State, belonging to bankrupt, the work having been done and materials furnished, whereon the liens were founded, prior to the filing of petition in bankruptcy.

Held, that such liens can be respected and allowed by the Bankruptcy Act only in case they were valid at the time of petition filed in bankruptcy. *Dey*, 305.

That rights acquired by judgment creditors, by levy prior to petition filed, must be preserved to them. *Wilbur*, 276.

4. Where bankrupt had filed his petition in bankruptcy, and in due course obtained a final discharge, certain creditors subsequently filed petitions and insisted before the Register that he should grant orders compelling the assignee to sell and convey certain property which had passed out of bankrupt's hands, and over which he had no control, to satisfy judgments which they had obtained against bankrupt, but which Register refused to entertain.

5. *Held*, the liens did not exist; but if they did, it was not competent for the creditors to enforce them after the bankrupt had been discharged. The Register was right in his conclusions, and they are ratified and confirmed by the court. *Dean* 769.

6. A Bankrupt Court will recognize and give effect to all liens, whether national or State, except maritime liens, according to their priority of dates.

Under the Act of Congress of February, 1845, liens created by State statutes on vessels navigating the lakes were treated as *quasi* maritime liens.

By virtue of the late decision in the tug Eagle case, in the Supreme Court of the United States, and the prior decisions in 4 Wallace, they can no longer be treated as partaking of the character of maritime liens.

In the Bankrupt Court, mortgages on vessels, recorded under the Act of Congress of July, 1850, in the office of the Collector of Customs, in the home port, of a prior date, shall receive a preference over the domestic claims. *Scott*, 742.

7. See JUDGMENT, *Mebane*, 347; DISTRIBUTION, *Hardee*, 580; STATE COURT, *Clifton et al.* v. *Foster et al.*, 656.

MARSHAL.

1. A transferred property to B, with a view to giving a preference. C purchased a portion of said property from B. The marshal seized the property and effects of A, including that purchased by C, under warrant, whereupon C prays the court to order a return of same.

Held, that the marshal, under a warrant issued in accordance with Section 40 of the Bankrupt Law, may take possession of the property of the debtor wheresoever and in whose hands soever he may find it.

2. That if indemnified, it is made his duty in the one case to *retain* possession, and to *take* possession in the other. With indemnity, he would be liable if he did not exercise his authority—without it, it is optional with him. *D. M. Briggs*, 638.

MORTGAGES.

1. Where a valid mortgage of a plantation was made in Louisiana to secure advances of cash and supplies, to be made from time to time, for the purpose of working it, not to exceed in amount twenty-five thousand dollars, to be reimbursed out of its products; and advances were made to exceed fifty thousand dollars, and reimbursements to an amount that, however, left a balance due exceeding twenty-five thousand dollars,

Held, the mortgage is good as security to its full amount, on any balance remaining on advances and reimbursements under it, and is not extinguished by the reimbursement of the first twenty-five thousand dollars.

2. A mortgage given to secure the payment of four promissory notes, made to raise means to work a plantation, is valid, and, upon the negotiation of the notes, relates back to the date of execution. *York & Hoover*, 661.

3. A, carrying on business, gave his sister a chattel mortgage upon his stock in trade. The mortgage was duly filed for record, but A retained possession of the mortgaged goods, continued business, and was subsequently adjudged a bankrupt.

Held, that the mortgagee had no title to the mortgaged goods paramount to that of other creditors. *Manly*, 291.

4. Bankrupt borrowed two hundred and fifty dollars of G. in October, 1868, without security or date of repayment mentioned, and on December 17, thereafter, borrowed one thousand dollars more, and gave chattel mortgage on his household furniture to secure the repayment thereof, and also of the said two hundred and fifty dollars, which was duly recorded. On the 24th of December, bankrupt petitioned in voluntary bankruptcy, and was thereupon adjudicated bankrupt, and assignee was appointed February 3, 1869. Mortgagee demanded payment on February 5, 1869, and sold and assigned her mortgage to S. on the 8th of February, for twelve hundred and fifty dollars. S. took possession of the mortgaged property, supposed to exceed in value the amount of the mortgage. Assignee in bankruptcy petitioned to have said mortgage set aside as void.

Held, the mortgage is valid as to the one thousand dollars, it not being shown that the same was not made in good faith.

5. It is valid as to the two hundred and fifty dollars, the mortgagee not having reasonable cause to believe it was made in fraud of any provision of the Bankruptcy Act. *Rosenberg*, 130.

6. It is no defense of mortgages that they were security which the debtor, long before, when solvent, at the time of the debts incurred, had promised to give the creditors, and that they were finally given under pressure of said creditors. *Graham, Assig.*, v. *Stark*, 357.

7. A bankrupt, in July, 1867, gave D. a mortgage upon the fixtures and tools in his factory, which recited that D. had indorsed notes for him on a promise of security. The condition was that the bankrupt, his executors, administrators, and assigns should, at or before the expiration of nine months from the date of the mortgage, pay certain promissory notes and save D. harmless from the payment of the same. One note was then described, and the condition proceeded: "and any and all notes given and indorsed by said D., for the accommodation of the said bankrupt during the pendency of this deed." The note described in the deed, and all other notes given or indorsed within nine months after the date of the deed, were paid, but the parties continued in their course of dealing, and there were outstanding at the time of the bankruptcy, in January, 1869, notes of the like description to a greater amount than the value of the mortgaged chattels.

Held, that the mortgage deed secured the notes made and indorsed after nine months from its date, and that the notes outstanding at the time of bankruptcy were secured thereby.

8. An unrecorded mortgage of personal property which has not been delivered to and retained by the mortgagee, is valid against the assignee in bankruptcy of the mortgagor. *Griffiths*, 732.

MUTUAL DEBTS.

Insolvent firm made a general assignment for the benefit of all creditors, and F., their assignee, proceeded to dispose of the property. On petition of creditors, the firm was adjudicated bankrupt in having committed an act of bankruptcy by making such assignment. The assignee in bankruptcy brought action against F. to recover the balance in his hands.

Held, the case is one of mutual credits between the bankrupts and F., and he is entitled to compensation for his services rendered in the premises, and may set off the amount allowed therefor against the claim of the assignee in bankruptcy. *Catlin, Assig.*, v. *Foster*, 540.

ORDINARY COURSE OF BUSINESS.

Where assignees in bankruptcy impeached a transaction involving a transfer by the bankrupts of a mortgage and promissory notes to holders of their check, if it be shown to have been made out of the ordinary course of business, it is *prima facie* evidence of fraud, and the burden of proof is cast upon the defendant to show the validity of the transaction. *Collins & Farrington, Assig.*, v. *Bell et al.*, 587.

PARTNERS.

1. S., a copartner, agreed with another copartner, who retired for a consideration, to dissolve partnership, except so far as necessary to continue

same for liquidating its business, and to apply the proceeds of its property in payment of the partnership debts; and thereafter, S. having made a special assignment for benefit of the firm and other creditors, he was adjudicated a bankrupt, individually, on petition of a creditor. Assignee in bankruptcy petitioned to have said assignment set aside, and the assignee under it to account for the proceeds, part of which he had paid to judgment creditors under decree of court.

Held, the assignee in bankruptcy of the individual partner has no title to call upon the other assignee, or any one else, to account for partnership property transferred by the retiring partner, and subsequently assigned, and his petition must be dismissed. In order to reach the partnership property through the Bankruptcy Court, all the copartners must first be adjudicated bankrupt. *Shepard*, 172.

2. A firm, originally composed of three members, was dissolved by the withdrawal of one. The two remaining members, constituting a new firm, subsequently filed their petition in bankruptcy. Upon objection being made by the member of the firm who had withdrawn, it was

Held, that the court has jurisdiction of the petition of the two parties, though the firm may have been composed of three. *Mitchell et al.*, 441.

3. Where a member of a bankrupt firm had failed to file schedule of his personal property,

Held, the other members would not, on that account, be refused a discharge. *Scofield*, 551.

4. A copartnership existing between H. and R. was terminated by R. assigning and transferring all his interest as copartner to a third party. H. subsequently filed petition that the firm, and each of its members, be adjudged bankrupt.

Held, the prayer of the petition must be denied as to the firm and as to R., inasmuch as the case is not within the provisions of Section 36 of the act, and H. and R. were not copartners, and no property of the said copartnership, as such, existed at the time said petition was filed. Order of adjudication entered as to H. *Hartough*, 422.

5. Firm dissolved, with written agreement that one member should assume and pay its obligations, including outstanding commercial paper. Payment thereof was suspended, and was not resumed in fourteen days.

Held, that such suspension was an act of bankruptcy, and the firm must be adjudicated bankrupts. It is unnecessary to allege or prove fraud in such suspension, where payment is not resumed within a period of fourteen days, 1 N. B. R., 181. *Weikert & Parker*, 27.

6. Where the members of a firm which is insolvent make a conveyance of all their joint personal property to creditors who have reasonable cause to believe the firm to be insolvent, and within four months thereafter, one of the firm is adjudged a bankrupt on his own petition, the conveyance to such creditors by all the partners does not constitute a preference which the assignee of the bankrupt partner can avoid. *Forsaith*, 48.

7. Though a firm be dissolved, it may still exist *quoad* the creditors, under Section 36, and the several members may be adjudged bankrupt on peti-

tion of one, in a proper case, without the consent of the others. *Foster & Pratt*, 237.

8. Under the Bankrupt Act (Section 36), assets are to be marshaled between the firm creditors and the separate creditors of the partners only when there are firm and separate assets, and proceedings are instituted against the firm and the individual members, as provided in that section.
9. Where a partnership has been dissolved, and one of the copartners purchases *all* of the assets of the firm, and agrees to pay all of the debts, and both partners subsequently become bankrupt, and are individually put into bankruptcy, so that there is no solvent partner and no firm property, *Held*, under the Bankrupt Act of 1867, that the creditors of the firm, as well as the individual creditors of the partner who assumed to pay the firm debts, were entitled to share, *pari passu*, in the estate of such partner. *Downing*, 748.
10. See PROCEEDINGS IN BANKRUPTCY; DISCHARGE, *Penn*, 582.

PAYMENT.

In the case of an involuntary proceeding in bankruptcy, the payment into court by the debtor of the amount due the petitioner, in pursuance of a previous tender, cannot defeat the petition, it not being proper for the petitioner, when the debtor is insolvent, to accept payment in full at the expense of the other creditors. *Williams*, 286.

PETITION.

1. A copartnership had carried on business in New York and Massachusetts for two months, within the period of six months before one member, without the consent of the others, filed his petition in bankruptcy, with schedules of individual and copartnership liabilities and assets, praying that petitioner and the firm members be respectively adjudged bankrupt. The firm as such had done business nowhere else, and for no longer time than two months within the period stated. *Foster & Pratt*, 236.
2. *Held*, the petition having first been filed in this district, the court has jurisdiction of the firm and its members. *Foster & Pratt*, 237.
3. When a petition is filed against a person, praying that he may be adjudged a bankrupt, it should state the facts clearly, and when it does not, the respondent may decline to answer it. *Randall*, 18.
4. A mere conformity to the statement of the act of bankruptcy in the language of the statute is insufficient. *Id.*
5. A general statement in a petition, that a debtor, in January, 1869, stopped payment of his commercial paper for the period of fourteen days, is not such an allegation of fact as will warrant an adjudication of bankruptcy. *Id.*
6. This allegation should state as nearly as possible the date of the promissory note or bill of exchange of which payment had been stopped; to whom made, and for what amount, and when payable; and whether the debtor was liable thereon as maker or indorser; and by whom the same was held when payment was neglected or refused. *Id.*

PLEADING.

1. In opposing discharge, the facts relied on must be stated in the specifications filed, without requiring a reference to other parts of the record of the case. *In re* Eidom, 105.

2. Petition filed in involuntary bankruptcy, was signed in the firm name of creditors, and affidavit made thereto by one C., a member of the firm, averring that the defendant, "being a trader, had fraudulently suspended and not resumed payment of his commercial paper within a period of fourteen days."

On demurrer, *Held*, objection to the sufficiency of averment cannot strictly be raised on demurrer, but should be by answer.

The intent of the alleged bankrupt in suspending payment should be alleged as a fact. *Orem* v. *Harley*, 263.

3. Bankrupt executed a deed of trust of certain lands in Florida, which was duly recorded; but trustees never took possession or steps to carry out the trust, but the property remained in the possession of bankrupt. Assignee petitioned to have the trust-deed set aside and delivered up to the trustees to be canceled, as throwing a cloud on title.

Held, it not being alleged and no facts shown that such conveyance was in fraud of creditors, the petition must be dismissed with costs.

It should have been alleged and proved that the conveyance was in fraud of creditors under the laws of Florida, wherein the land is situate. *Broome*, 344.

4. *Held*, defendant may set forth in his answer as many defenses as he has, but they must be stated separately. The reduction of indebtedness below two hundred and fifty dollars, by the conditional payment, disables petitioners to maintain suit.

If the notes received in conditional payment turned out to be worthless, and that the alleged payment was therefore no payment, petitioners should reply to the plea. *Ouimette*, 567.

5. Where solicitor of bankrupt moved that the assignee be ordered to amend his return in a certain respect, but nothing appeared to show wherein such amendment was proper or necessary, or what interest of the bankrupt would be affected,

Held, the assignee is not required to make the amendment. *Kingon*, 446.

6. Before the court can take action on the failure of an assignee in bankruptcy to comply with the requirements of General Order No. 28, the same must be shown to it by at least *prima facie* evidence. *Goodwin*, 417.

7. Fraudulent suspension and non-payment is necessary to be averred only when the act of bankruptcy charged is that specified in Clause 9 of Section 39 of the act.

Language that N., "being a merchant," is a sufficient averment that he is a merchant under said Clause 9. *Nickodemus*, 230.

8. See ANSWER, *Ouimette*, 566.

POWER OF ATTORNEY.

A member of a bankrupt firm cannot represent claims against the estate. *Mitteldorfer*, 39.

PRACTICE.

1. To enjoin the foreclosure of a mortgage in the State court on realty in the possession of the assignee.

2. Proceeding by the assignee should have been by bill in equity, and not by petition.

Leave granted for petition to be amended and filed as such bill. *New York Kerosene Co.*, 125.

3. Where creditors of a bankrupt had adopted a resolution appointing trustees under Section 43 of the Bankruptcy Act, the confirmation of which was opposed,

Held, that the parties desiring the confirmation of the resolution were the moving parties, and should serve their papers on the opposing parties, that they might answer them. *American Cloth Co.*, 285.

4. Assignees in bankruptcy of a firm sent back to the Register for additional proof a certain claim of M., proved by the oath of a member of the firm as trustee of the claimant. On application to the District Judge by the counsel of the trustee, it was ordered that a dividend on the claim be paid. The assignee was not heard on the application, and petitioned the Circuit Court to review the case.

Held, the District Court has power, upon petition of the contesting creditor, to reverse the decision of an assignee rejecting his claim, but the mode of proceeding must be regular, and the assignee should have opportunity to answer and contest the claim. Order of the District Court reversed. *Mitteldorfer*, 39.

5. Where a voluntary assignment under the State Law was adjudged valid, and debtors subsequently went into bankruptcy, a special receiver held moneys of bankrupts which had come to his hands through a voluntary assignment under the State Law, adjudged to be valid.

Held, a proper portion thereof ought to be distributed among the creditors in bankruptcy, not through the assignee in bankruptcy, but direct by such receiver to the proper distributees. Reference ordered to Master to ascertain and report as to amount of dividend, distributees, etc., etc. *Sedgwick, Assignee*, v. *Place*, 302.

6. Bankruptcy—discharge refused by court. It is the duty of the court to refuse a discharge to the bankrupt where, upon an inspection of the record, it appears that he has done those acts which prevent his receiving a discharge, although no objections are interposed by creditors. *Wilkinson*, 286.

7. When there is an attempt to state a particular stoppage or suspension of payment, and the same is stated defectively or insufficiently, the respondent should have declined to answer it, on that ground, and asked that it be made more definite and certain, or stricken out. *Randall*, 18.

8. When the allegation is a general one—that the debtor stopped payment of his commercial paper—without containing any particular fact or facts pointing to any particular paper, as to this, there are no "facts set forth in the petition" which the debtor is required to prove not true, to prevent being adjudged a bankrupt thereon. *Randall*, 18.

9. A bill of expenses was presented on behalf of petitioning creditors, approved by the Register, and approved and ordered to be paid by the District Judge. Assignees refused to pay same, and petitioned the Circuit Court for review.

Petitioning creditors are entitled to be reimbursed, on motion, for their reasonable expenses in proceedings against involuntary bankrupts.

They must file claim therefor, and assignees are entitled to be heard against its allowance, and may contest the items of the claim. *Mitteldorfer*, 39.

10. See DISCHARGE, *Penn*, 582; REGISTER, *Loder*, 656; REGISTER, *Herrman & Herrman*, 618; DISCHARGE AND COSTS; DIVIDEND; COUNSEL FEES; SUMMARY PROCEEDINGS; DISMISSAL PROCEEDINGS, *Camden et al.*, 590.

PREFERENCE.

1. Debtors, merchants, knew themselves to be insolvent, but represented to creditors on debts past due that they were solvent. The creditors, however, exacted as security a chattel mortgage, dated May 9, 1868, on a large portion of debtors' goods, and on a failure to receive payment of an installment thereunder, took possession on the 15th of July, 1868, under the mortgage, sold the goods, and applied the proceeds. Thereafter, on August 3, 1868, debtors filed petition in bankruptcy, and were duly adjudged bankrupts. Assignee in bankruptcy brought action against the creditors to recover the value of the goods so sold.

Held, said mortgage was, within the meaning of Section 35 of the statute, made by the bankrupts with a view to give a preference.

The creditors had reasonable cause to believe that their debtors were insolvent when the mortgage was made, and it constituted a fraudulent preference.

Judgment in favor of plaintiff. *Driggs, Assignee*, v. *Moore*, 602.

2. Bankrupts owed about ten thousand dollars on ten promissory notes given to creditor at one transaction, and subsequently became unable to pay their debts in the ordinary course of business, as men usually do. Creditor, having reason to believe this, pressed his claim, and (1) Received an account from debtors against a third party to collect and apply on the indebtedness; (2) Gave another party an order on the debtors for money, part of which they paid, to apply on the indebtedness; (3) Obtained and received goods from the debtors to be applied in like manner; (4) Indorsed the several sums so received, on three of the notes, as of a date different from that on which the indorsement was made and the amounts received, and (5) Failed to surrender the property and money so received to the assignee in bankruptcy. Creditor sought to prove claim in bankruptcy for the balance of the indebtedness.

3. *Held*, that proof of debt be disallowed. The creditor received a preference contrary to the provisions of the bankruptcy statute. *Kingsbury et al.*, 317, 318.

4. *Held*, where a firm was insolvent, and, at the time of giving a warrant of attorney authorizing a confession of judgment, had reason to believe that they could not pay their debts in the ordinary course of business, that the giving of a note and power of attorney to confess a judgment

operated as a preference. *Campbell, Assignee,* v. *Traders' National Bank,* 498.

5. Although a security given to a creditor by mortgage be out of the usual course of business of the debtor, yet, unless the creditor know of the insolvency of the debtor, or have reasonable cause to believe him insolvent, the security will be valid, and may be enforced, although the debtor may have been in fact insolvent at the time the security was given. *John R. Lee, Assignee,* v. *German Savings Institution,* 218.

6. Lawyers were employed by bankrupt to prepare petition and schedules, soon to be filed in voluntary bankruptcy, and by agreement bankrupt gave them his note of hand for the amount due, secured by mortgage of his real and personal property, set forth in the schedules as assets.

Held, the mortgage was made contrary to provisions of the 35th Section of the act, is a nullity, but they can prove their claim as unsecured creditors. *Evans,* 261.

7. Security given to a creditor by an insolvent debtor, out of the ordinary course of business, cannot be held valid simply because it proceeded from the voluntary act of the debtor without previous communication with the favored creditor, either as to the security or debtor's financial condition. *Graham, Assignee,* v. *Stark,* 357.

8. Where bankrupt had, by his agent, unlawfully used funds coming into his hands, belonging to one Mayer, and had offered his draft, due in thirty days, for the money thus appropriated, Mayer refused to accept it, and instructed his attorneys to commence suit by attachment at once; the agent proposed to turn over certain goods to secure the payment of the money made use of, which the attorneys accepted. Neither the bankrupt, his agent, nor the attorneys being in any way aware of the insolvency of the bankrupt.

Held, as there is no evidence that any creditor or purchaser was deceived or misled, it is good between the parties.

This being a valid pledge of goods, the money paid to redeem the goods from that pledge cannot be recovered.

The goods thus pledged, being of greater value than the debt, should be redeemed for the benefit of creditors. *Jenkins, Assignee,* v. *Mayer,* 777.

PRIORITY.

The plaintiff, in judgment obtained in the Federal Court on which execution issued, and under which the Marshal sold, is entitled to the proceeds of such sale, although that judgment, execution, and levy under it was subsequent to the judgment, execution, and levy of the process from the State court. *Jordan,* 182.

PROCEEDINGS IN BANKRUPTCY.

1. Where the mortgagee removed the property mortgaged from the possession of the bankrupt after proceedings commenced in bankruptcy,

2. *Held,* The mortgagee must surrender the property in specie to the assignee in bankruptcy, to be sold by him to the best advantage of all interested; if not possible so to surrender it, the mortgagee must account to the assignee

for the value of the mortgaged property at the time when taken, the proceeds to be applied to the payment of the mortgage, and the surplus, if any, be disposed of as assets. *Rosenberg*, 130.

3. Bankrupt was a member of two copartnerships, and without notice to his other copartners, filed his individual petition in voluntary bankruptcy, showing in his schedules assets and liabilities of the two firms. He was adjudicated a bankrupt individually, and assignees were appointed who petitioned that the court adjudge the two firms respectively bankrupt, as being insolvent, in order to the administration of their assets in the bankruptcy court.

The remaining copartners answered, denying the commission of any act of bankruptcy by either firm, and demanded a trial by jury.

Held, the assignees had properly instituted and could maintain the said proceedings.

4. The bankrupt could not be properly discharged unless the assets of the insolvent firm should be so administered.

5. If the respondents denied the insolvency of the firms, jury trial would be granted; but not being denied, the said firms would be respectively adjudged bankrupt. *Grady et al.* v. *Hawthorne*, 227.

6. Creditors petitioned to have debtor declared bankrupt; process issued thereupon, and bankrupt, by indorsement on copy of said petition served upon him, admitted the truth of the allegations therein contained, except as to those of fraud, and before the day to appear and show cause the bankrupt filed his voluntary petition in the same court and was adjudicated bankrupt by proper Register.

On motion to set aside the said adjudication of bankruptcy as void,

Held, that the same was nugatory and of no effect pending the proceeding in involuntary bankruptcy. Adjudication accordingly set aside and debtor adjudged bankrupt by the court on petition of creditors, and schedules previously filed by him ordered to be held as filed under such adjudication. *Stewart*, 108.

So long as joint debts of a firm remain outstanding and unsettled, proceedings in bankruptcy, whether voluntary or involuntary, may be joint. *Williams*, 286.

7. A response to the rule to show cause in involuntary bankruptcy, which denies the acts of bankruptcy charged in the petition, and demands a trial by jury, is sufficient, without a formal answer to the petition.

It is to be doubted whether, on the trial of that issue, the validity of the petitioning creditor's debt can be made the subject of inquiry. *Phelps* v. *Clasen*, 87.

PROOF OF DEBTS.

1. That the Register has the right to permit or require the deposition to be amended.

2. That where a note is payable *in coin* the demand should be entered upon the books of the assignee as payable in the stipulated currency.

3. Where a claimant against a bankrupt's estate illegally increases the amount of his claim, or where a portion of the consideration is good, and

a portion illegal, he will not be allowed to separate the good from the bad and prove his claim under the Bankrupt Law. *Estate of Elder*, 670.

4. The court has, at all times, full power and control over proofs of claims, and may allow amendments and supplemental proofs to be filed. *Montgomery*, 424.

Where an insolvent paid an amount on account, being indebted on ten notes,

5. The said payments not having been applied at the time on any or either of the said ten notes, the creditor cannot avoid the effect of accepting the preference by a subsequent indorsement on three of the notes. The preference was made on creditor's debt as an entirety. *Kingsbury et al.*, 318.

6. Where a creditor proved claims on two old promissory notes, and then applied to amend proof so as to show that a new note had been given in a settlement, in which said two notes were part consideration, and they had been proved by mistake,

Held, application to amend must be denied. The creditor may prove a new claim on the new note, and an examination may be had on application of the assignee into the validity of the claims. *Montgomery*, 430.

7. A deposition by an assignee for value of a *chose in action*, before bankruptcy, is sufficient to entitle him to prove his debt and to be considered the creditor in respect to such debt; and such assignee of a *chose in action*, so proving, may have the right to take any such action or proceedings in the cause in the name of his assignor at his own expense, as he may be advised. *Fortune*, 312.

8. *Held*, that to entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, or oath, or solemn affirmation before the proper Register, or commissioner, setting forth the demand, the consideration, etc., etc. *Estate of Elder*, 670.

9. A creditor may correct clerical errors in his proof of claim at any time before final dividend. *Ben. H. Myrick*, 156.

10. Where a creditor, after the filing of the bankrupt's petition, but before the first meeting of the creditors, transfers his debt to another, the debt may be proved by the owner of it at the time of proof, the oath being modified to suit the facts of the case. *Murdock*, 146.

11. Before the choice of assignee, if such a mortgagee seeks to prove his debt, he must abandon his security; but, after appointment of assignee, he may prove for any balance of his debt, after deducting the value of the mortgaged property, as agreed upon with the assignee. *High & Hubbard*, 191.

12. That if the statement of the consideration is so general and indefinite as to afford no aid to the creditors in their inquiry as to the fairness and legality of the claim, it does not effect the object of the law, and must be held insufficient. The kind of goods, the quantity, the price, and the time of sale and delivery should be stated. *Estate of Elder*, 670.

13. The prohibition of "further proceedings," is intended of proceedings upon the petition and against the debtor, and not of collateral proceedings by or against third persons, or even the debtor. *Muller & Brentano*, 329.

14. A judgment-creditor received a preference, and not having surrendered

what property was received under it, on proving his claim in bankruptcy, the proof thereof must be rejected. *Davidson*, 418.

15. Is a debt which exists at the time of the actual adjudication of bankruptcy, although not existing at the time of filing the petition for adjudication, provable against the bankrupt's estate?

16. *Held*, it is the intention of the act that such debts, and such only, as existed at the time of the filing the petition for adjudication of bankruptcy, are provable against the bankrupt's estate. *Crawford*, 698.

17. Where judgment had been rendered for a debt by a Justice of the Peace, previous to the adjudication of bankruptcy, and had not been satisfied,

Q.—Was the debt, as it stood at the time of the adjudication, provable or not?

Held, the debt is not so merged in the judgment as to deprive the creditor of the right to prove it. *Vickery*, 696.

PROPERTY.

The bankrupts agreed to build a locomotive engine for the petitioners. They notified the petitioners that the engine was finished and dispatched, who thereupon paid the price. No such engine then existed, but two engines, either of which would answer the contract, were afterwards finished, and one of them was delivered to a third person before the bankruptcy. At the date of the bankruptcy the other was finished, but not dispatched.

Held, that the petitioners had a title to the engine as against the bankrupts and their assignees by estoppel. *Rockford Rock Island Co.*, 50.

REASONABLE CAUSE.

1. A sale cannot be declared void unless the purchaser had reasonable cause to believe the seller to have been insolvent when he made the sale, and reasonable cause means a state of facts which would put a prudent man upon inquiry as to the condition of the person from whom he purchases. *J. R. McDonough, Assignee*, v. *Raftery*, 221.

2. That when a person suspects the solvency of his debtor, and in consequence of that suspicion obtains property or money, and thereby a preference, and it turns out in fact that his debtor is insolvent, that he may be said to be in the predicament contemplated by the Bankrupt Law, he has reasonable ground to believe that his debtor is insolvent, and cannot avail himself of a judgment or security so obtained. *Campbell, Assignee*, v. *Traders' National Bank*, 498.

3. When a creditor accepts a security he is conclusively presumed to know what appears on its face, and to have reasonable cause to believe it was intended to accomplish its ordinary and necessary effect. *Graham, Assignee*, v. *Stark*, 357.

4. See PREFERENCE, *Driggs* v. *Moore*, 602.

RECEIVER.

Assignee in bankruptcy filed bill to set aside as null and void a voluntary

assignment for benefit of creditors, made by bankrupts, and pending the suit moved that a receiver be appointed. The voluntary assignees had given security by order of State court for the faithful performance of their duties, but had been enjoined from action in the premises by the Bankruptcy Court.

Held, that it was a proper case for the appointment of a receiver, and one would be appointed. *Sedgwick* v. *Place*, 139.

See PRACTICE, *Sedgwick* v. *Place*, 302.

RECORDING.

1. An assignment executed to the assignee by the Register, there being no opposing interest, does not require to be proved before a Clerk of the Superior Court, or his certificate to prepare it for registration.
2. Registers of deeds must record the same upon a certificate of the Clerk of the District Court, that the same is a copy of the assignment on file in his office, with his seal affixed, upon demand that the same shall be recorded, and a tender to him of the fees allowed for such service by the laws of the State. *Neale*, 177.

RECOVERY OF PROPERTY.

When a creditor has reasonable cause to believe his debtor insolvent, purchases goods of him, and such debtor makes the sale with a view of giving a preference, the transaction is void, and the assignee in bankruptcy of such insolvent may recover the value of the goods from such creditor. *J. R. McDonough, Assignee*, v. *Raftery*, 221.

REGISTERS.

1. Where counsel, representing certain creditors, objected to the votes of other creditors being received for choice of assignee, on the ground that one had accepted a preference, and the claims of others had been purchased with the bankrupt's money, opposing counsel offered contrary proof which the Register declined to hear, an injunction order having been produced by first counsel.

Held, that the Register was right. The Register has power to postpone proof of a claim until an assignee is chosen, if a case is made out for such postponement within Rule 6 of this court; but he has no power to institute or set on foot the inquiry provided for by the last clause of Section 22 of the act. *Herrman & Herrman*, 618.

2. Where depositions for proof of debt had been transmitted from one to another Register,

Held, a Register is not bound to receive and file a deposition for proof of debt taken and certified before another Register. If an issue of law or of fact is raised or contested, he must adjourn the question into court for the decision of the judge. *Loder*, 655.

3. When the Registers have no power to order bankrupts to execute deeds. *A. B.*, 244.

4. Cannot decide on the materiality or relevancy of questions propounded to a witness at an examination. *Bond*, 7.

RENT.

1. Bankrupt held his store on a verbal lease, terminating May 1, 1869, for sixteen hundred dollars per annum and taxes. On December 26, 1868, he surrendered his stock of goods to the Register, and delivered to him the key of his store. The Register turned the same over to the assignee, March 2, 1869, and on the 25th of March the goods therein were sold by the assignee's order. On the 1st of February, the landlord executed another lease to a stove company. Toward the end of April applications were made to the assignee for the key, and he immediately delivered it up. The store had been unoccupied by the assignee after the 1st of April, and he was ignorant of the owner and of the second lease. The landlord claimed rent from December 26, 1868, to February 1, 1869, and the Stove Company claimed rent at the rate of two thousand dollars per annum from February 1, 1869, to May 1, 1869.

Held, the assignee should only pay rent at the rate of sixteen hundred dollars per annum to April 1, 1869. *Merrifield*, 98.

2. Bankrupts before proceedings in bankruptcy rented storehouse under written lease; assignees retained possession with bankrupts' goods therein, but finally surrendered the premises to the lessor.

Held, the lessor had a preferred claim for the rent. He had a lien which he could have enforced by distress at the term of commencement of proceedings in bankruptcy, and upon the facts stated had not waived it. *Walker* v. *Barton*, 265.

3. Under the English law, proceedings in bankruptcy did not interfere with the right of the landlord to distrain for rent, provided the property remained on the demised premises.

Under the Bankrupt Law of 1841, the right of the landlord to distrain, in those States where such right existed, was not lost.

Held, that the right of the landlord to distrain for rent may vary in different States under the Bankrupt Law, because the right of the landlord to distrain is not the same under the laws of all the States.

That under the statute of Illinois the distress-warrant is in the nature of an attachment upon *mesne* process, and the certificate given by the court after the case is heard in the nature of an execution.

In Illinois, when no distress-warrant has been issued prior to the filing of the petition in bankruptcy, the landlord has no priority or preference over the general creditors, and must prove his debt like any other general creditor of the bankrupt. *Joslyn ect al.*, 473.

REPLEVIN.

1. The proper remedy of said creditors was to apply for relief to the United States District Court, or commence action against the assignees in said court.

Petition for review dismissed. *Vogel*, 198

2. Creditors replevied certain goods of bankrupt in a State court after petition filed, but on application by the assignees the United States District Court ordered said goods to be delivered to them. On appeal from this order it was

Held, that the title to all property in the actual possession of the bankrupt, at the time of commencement of proceedings in bankruptcy, passed to assignees. *Vogel*, 198.

RESTRAINING SUIT.

1. Where judgments were obtained in good faith against a bankrupt, and levies, on executions issued under them, were made prior to the filing of his petition in bankruptcy, after which injunctions were granted by the Bankruptcy Court, which, after the lapse of several months, the creditors moved to dissolve, the assignee in bankruptcy having taken no steps in the matter:

Held, that as it did not appear that the property levied upon was worth more than the amount of the judgments, nor that a sale by the assignee would realize any more than a sale by the sheriff, and as there was no proof that any advantage would result to any creditor by continuing the injunction, it must be dissolved. *Wilbur*, 276.

REVIEW, PETITION FOR.

1. The Circuit Court has revisory jurisdiction of all decisions of the District Court, from which an appeal or writ of error under the 8th Section cannot be taken. *In re Alexander*, 33.

2. Bankrupt petitioned United States Circuit Court to review decree of the United States District Court, declaring him bankrupt, and commenced proceedings in State court to enjoin petitioning creditors, who thereupon moved the Circuit Court that he be ordered to elect whether he would further prosecute his petition to review, or his actions in State court, and unless he elected to discontinue and abandon the latter, that his petition to review be dismissed.

Held, the petitioner has a right to prosecute his petition to review if done in due form and without fault therein. *Beecher* v. *Bininger*, 489.

3. See APPEAL, *Alexander*, 29; TIME, *Id.*, 32

SECURITIES.

1. G. was carrying on lumbering operations, and applied to H. for assistance, who made, on February 5th, advances for that purpose, and received as security therefor (and what he should owe him on settlement), an assignment of G.'s permits. G. filed his petition in bankruptcy February 29th. H. made other advances on March 21st, and transferred his claims against G. to P., who received from H. a transfer of the permits, and made other advances to G., to complete the operations. The assignee sold the logs by order of court under Section 25, and the cause was referred to the Register to settle and adjust accounts.

Held, that under Section 14, the title of the assignee relates back to the date of filing the petition in bankruptcy; that the advance of February 5th was a legal claim, and should be paid by the assignee; that the advances subsequent to February 29th, constitute an equitable claim only, and should be confined to discharging lien claims for labor, getting the logs to market, and stumpage, etc. *Gregg*, 529.

2. The rule in bankruptcy, that a creditor, having security for his debt, is to be admitted as a creditor only for the balance of his debt, after deducting the value of his security, is not founded in the principles of equity.

The obligation of the debtor being the principal, and the pledge, the collateral or incident, the creditor has the right to resort to the debtor in the first instance, retaining the pledge for any deficiency, which he may be unable to collect of his debtor. *Jervis* v. *Smith*, 594.

3. A judgment creditor cannot claim a jurisdiction of the Bankruptcy Court for the collection of his debt, fully secured by the only lien on real estate. *Avery* v. *Johann*, 144.

4. Where a creditor holding a mortgage lien upon the real estate of bankrupt as security, etc., proceeds to foreclose,

Held, a creditor, whose debt is provable, cannot prosecute to final judgment either at law or in equity. Creditors holding security can be admitted as creditors only on the balance after sale thereof—he must go into court. *J. M. Snedaker*, 629.

5. A mortgagee cannot prove his debt in bankruptcy, unless he releases or surrenders the mortgaged property, or agrees with the assignee as to its value, so that he might prove for any excess of indebtedness over such value. *High & Hubbard*, 191.

SERVANTS' WAGES.

Certain workmen employed by bankrupt within six months before bankruptcy, were not paid, and applied to L. to advance money on their claims, to enable them to reach their homes, at a distance; L. to be reimbursed the advance, interest thereon, and necessary expenses incurred. An absolute assignment was executed by each to L., having been drawn by a person not a lawyer. L. applies to be paid from the bankrupt's estate the amount so advanced out of fifty dollars to be allowed to each workman as prior liens.

Held, the claims and demands in question should be allowed. *Brown*, 220.

SET-OFF.

A creditor may be entitled to the set-off, notwithstanding proof of his claim therefor against the estate had been stricken out in proceedings before the Register, as not being a provable debt. *Catlin, Assig.*, v. *Foster*, 540.

SPECIFICATIONS.

1. Where one Colt, a creditor, opposed the discharge of bankrupts in a specification of twenty subdivisions, charging false swearing by the bankrupts on material matters before the Register, and concealment of assets, none of which allegations were sustained,

Held, that the discharge be granted, and a decree entered that bankrupt recover from the creditor the costs, to be taxed, of resisting the opposition of their discharge. *Robinson & Chamberlain*, 70.

2. A person not a creditor at the time of alleged removal of property, or whose claim was barred by limitation at the time of such removal, cannot be heard in objection to discharge. *Burk*, 296.

3. Specifications referring to facts supposed to be shown on an examination of bankrupt *held* to be faulty.
4. Specifications opposing a discharge must be precise and definite, and must particularize facts, description of the grounds of opposition, setting forth time, place, person, etc.
5. Facts relied upon in opposing discharge should be set forth alone, without reference to any matter *aliunde*. *Eidom*, 105.

STATE COURTS.

1. The District Courts U. S. have jurisdiction to enjoin proceedings in State courts, touching property held by the assignee in bankruptcy within their respective districts. *N. Y. Kerosene Oil Co.*, 125.
2. On a motion to dismiss a petition to enforce a mechanic's lien in Massachusetts, on the ground that petitioners, on their own petition, had been subsequently adjudged bankrupts in the United States Bankruptcy Court,

Held, the mechanic's lien was not dissolved thereby.

The State court may entertain the petition without necessarily conflicting or interfering with the jurisdiction of the Bankruptcy Court. Motion to dismiss denied, and case ordered to stand continued to await the result of the action of that court. *Clifton et al.* v. *Foster et al.*, 656.
3. A power to represent a creditor in bankruptcy is not subject to stamp duty by existing laws. *Ben. H. Myrick*, 156.
4. See CORPORATIONS *Thornhill & Williams* v. *State Bank of Louisiana*, 435; see JURISDICTION, 524.

STAY.

Under Section 21 of the Bankrupt Law, a bankrupt who has omitted to apply for a stay of proceedings in an action against him, pending the question of his discharge, may nevertheless apply after judgment to have supplementary proceedings against him thereon stayed, on the ground that he has been discharged, if the plaintiff's demand be one affected by the discharge. *"World" Co.*, v. *Brooks*, 588.

STOPPAGE OF PAYMENT.

1. The stopping of payment of commercial paper, mentioned in Section 39 of the Bankrupt Act, must be fraudulent, and must continue for fourteen days, in order to be an act of bankruptcy.

Such suspension or non-resumption is fraudulent (supposing the liability to be undisputed), when it is done purposely, and not by accident or mistake. *Hollis, Kenney et al.*, 309.
2. When a man declines to pay, solely because he is not liable to pay, or because he has a valid claim or offset against the paper, this is not a stoppage or suspension within the meaning of the Bankrupt Law. *Thompson & McClallen*, 184.
3. Proof of the mere stoppage and non-payment of commercial paper for fourteen days, does not, of itself, establish an act of bankruptcy. Credit-

ors must show that such stoppage or suspension was fraudulent. *Davis*, 339.

SUFFERING PROPERTY TO BE TAKEN.

1. A creditor having knowledge of his debtor's insolvency, obtained judgment by default, issued execution, and sheriff levied on his property; other creditors petitioned to have the debtor declared a bankrupt, in thereby having committed an act of bankruptcy. Before trial, bankrupt filed voluntary petition, and thereupon was adjudged bankrupt. The judgment-creditor proved his claim for the full amount of his judgment, less what he would receive from the execution, if that should be deemed a valid payment. Assignee petitioned to have the said judgment set aside and declared void, and that said creditor and the sheriff be ordered to pay over to him, less the sheriff's fees, the amounts they severally held and received upon said execution; and further, that the judgment creditor's proof of claim be rejected.

Held, the bankrupt committed an act of bankruptcy, in so suffering his property to be taken by a creditor on legal process. *Davidson*, 418.

2. The words "suffer his property to be taken on legal process," as used in the 39th Section of the Bankrupt Law, construed. *Campbell, Assig.*, v. *National Bank*, 498.

3. Where a creditor having a judgment against a bankrupt which is a lien upon his real estate, proves his debt in bankruptcy, and comes in upon the bankrupt's estate for the whole debt, the assignee in bankruptcy is entitled to be subrogated to the rights of the judgment-creditor as regards its lien upon the real estate. *Wallace* v. *Conrad*, 41.

4. It is the duty of one who is insolvent, to apply to the Bankrupt Court in his own behalf, and if he does not, and some of his creditors take his property under legal process, he may be held to have suffered his property to be taken, and may be adjudged a bankrupt at the instance of creditors whose claims have not been provided for. *Wells*, 371.

SUMMARY PROCEEDINGS.

1. Assignee in bankruptcy petitioned to have an assignment of merchandise by the bankrupt to one K., and a transfer of goods to a firm, S. & Co., set aside as fraudulent preferences. On the appointed day, the parties, by their respective attorneys, entered and filed notice of appearance, and time was given by the court for them to answer. The attorney for S. & Co. thereafter put in an answer, denying the transfer of goods as alleged; and the attorney of K. sought, by notice in writing, filed with the clerk, to withdraw his appearance as having been made by mistake.

Held, the question as to the assignee in such a case proceeding by bill in equity, or in a summary way by petition, is one as to form, which the adverse party, in court by personal service of a notice to appear, or by voluntary appearance, may raise or waive as he chooses. He will be held to waive any objection if he does not raise the question by demurrer or answer within a proper time. *Ulrich*, 133.

2. Wife of bankrupt petitioned the Circuit Court to review a decision of the

District Court on a claim of the assignee that she held valuable stock that belonged to her husband.

Held, assignee cannot recover assets from third parties by summary proceedings, but must do so by bill in equity or suit at law. Such a case should therefore come up by appeal, and not by petition. Decree of District Court set aside as irregular, with leave for assignee to file bill, without costs. *Bonesteel*, 517.

3. Where the bankrupt suffered his property to be taken on legal process, under an execution issued in the Marine Court, intending to give a preference to certain creditors, the assignee prays that such lien may be declared void. By order of this court, the property was delivered to the assignee, subject to the determination of this court, the proceeds to be kept separate from the other estate. Counsel object that it is wholly irregular, because it was not brought upon a plenary bill in equity, etc.

The petition is dismissed without costs to either party as against the other, with leave to the execution creditors to file a bill in equity, or bring an action within thirty days. *L. S. Ballou*, 718.

SURPLUS FUNDS.

The surplus funds in the hands of the assignee, after the settlement of the estate, where no debts have been proved, and there is reasonable cause to believe that none will be proved, are to be paid to the bankrupt upon the filing of a petition on oath by him, setting forth his reasons for believing that no creditors desire to prove their debts, and asking that the funds shall be paid to him. *Hoyt*, 55.

SURRENDER OF PROPERTY.

Where a creditor received a preference, having reasonable cause to believe that the bankrupt was insolvent when it was made, but afterwards voluntarily surrendered to the assignee in bankruptcy all the property and accounts received by the preference, and then proved his debt against the estate in bankruptcy, counsel for assignee moved to strike out such proof of debt.

Held, the creditor was entitled so to prove his debt. Motion denied. *Montgomery*, 374.

See PROOF OF DEBT, *Davidson*, 418.

SUSPENSION.

HOW ALLEGED.

This allegation should state, as nearly as possible, the date of the promissory note or bill of exchange of which payment had been stopped; to whom made and for what amount, and when payable; and whether the debtor was liable thereon as maker or indorser; and by whom the same was held when payment was neglected or refused. *Randall*, 18.

TAXES.

A State has, in her sovereign capacity, a lien on all her realty for taxes

Such lien has priority over any claim of one of her citizens, no matter when such claim may have been acquired. *Brand*, 324.

TIME.

1. No time is prescribed by the act within which it is necessary to bring a petition for review. *In re Alexander*, 33.
2. Where no assets have come to the hands of the assignee, or no debts been proved against the bankrupt estate, it is discretionary with the court to grant the petition for discharge when the bankrupt fails to apply until after one year from date of his being adjudged bankrupt. *Canady*, 11.

TRADERS.

A bankrupt who has sold one carriage, one sleigh, two pairs of horses, one piano, one harness, and a part of a lot of cigars, but without ever having formed a deliberate purpose of buying goods to sell again in order to raise money, is not thereby made a merchant or tradesman within the meaning of the law, and a failure to keep proper books of account will not prevent his discharge. *Rogers*, 564.

TRUST FUNDS.

Where A, a merchant, holding a large sum of money belonging to B, a foreigner, was authorized to invest it in certain stock, which he did in his own name. He afterwards became bankrupt; and the certificate of stock having been deposited as security for money advanced by the Phenix Bank, could not be recovered either by the bankrupt or his solicitor. Application is made to court that the securities may be paid over to B.

Held, the securities must be passed to the assignee in bankruptcy. He is a creditor only for that amount, and can only participate in dividends with other creditors. *Ungewitter*, 723.

WAIVER.

1. The vendor's equitable lien upon land sold is not discharged by the subsequent taking of a mortgage upon the same land, and takes precedence over a judgment lien obtained prior to the said mortgage. *Bryan*, 110.
2. Where a mortgage was given by bankrupt, on five bales of cotton, while a lien existed on three hundred and twenty acres of land, in favor of mortgagee, which Register claimed was a waiver of the prior lien,

Held, the Register was in error. The lien on the land was not waived, nor in any way affected, by the mortgage on the cotton. The creditor has a valid, subsisting lien upon said three hundred and twenty acres of land; and that the opposition of bankrupt thereto be overruled. The assignee is ordered to sell said land, according to law, to satisfy said lien. *Hutto*, 787.

WIFE OF BANKRUPT.

1. It is the practice of this court to order an examination of the bankrupt's wife only when a *prima facie* case is made out by affidavit. The wife may be examined when on reasonable grounds she is suspected of having, or of having had property in her possession, which should have been surren-

dered to the creditors, or to have participated actively in any other fraud upon the statute. *J. F. Gilbert*, 152.

2. The wife of a bankrupt may be summoned and compelled to attend and be examined as any other witness, and may be punished for contempt if she refuses to answer. *Woolford*, 444.

3. Where bankrupt's wife refuses to appear, the proper proceeding is to issue an order to show cause why an attachment should not issue against her. *Bellis & Milligan*, 271.

4. The usual order and subpœna were issued for the wife of bankrupt to attend before the Register and be sworn and testify as a witness. She failed to appear, and counsel put in affidavit explanatory of her non-attendance, but questioned the authority of the court to compel her to testify in this cause. *Bellis & Milligan*, 270.

WITNESSES.

1. Witness, who is called as an expert, has passed his direct examination, showing that the debtor has falsified some of his books of account, etc. On his cross-examination he refused to answer questions irrelevant to the matter at issue, claiming the protection of the Register, and pleading that a truthful answer would bring upon him moral turpitude, or would tend to degrade and humiliate him. The witness is a foreigner, and the question asked referred to time previous to his residence in the United States.

Held, that as the question put to the witness did not relate to any matter of fact in issue, or to any matter contained in his direct testimony, and as a truthful answer to it would tend to degrade him, he was not bound to answer it. *H. Lewis*, 621.

2. A witness, who was a lawyer, being under examination, was questioned touching a certain conveyance made to him by the bankrupt and wife, and a subsequent conveyance by him to the wife, and refused to testify thereon as matter within the privilege of confidential communications between attorney and client.

Held, on the facts stated, the questions were proper and must be answered, and are not within such privilege. *Bellis & Milligan*, 199.

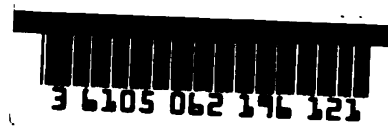
3. Whether the bankrupt should be allowed to consult counsel upon his examination, must be determined by the Register, according to the circumstances of each particular case. *Lord*, 243.

4. Witness must answer all proper questions relating to his trade and dealings with the bankrupt prior to bankruptcy, and if necessary to answer such questions must produce any book containing the transactions with the bankrupt. *Earle*, 304.

5. Where a legal adviser refuses to be sworn as a witness,

Held, the right to refuse to answer a question on the ground of privilege, does not warrant a refusal to be sworn as a witness. *Woodward*, 719.

See ATTORNEY, *O'Donohoe*, 245.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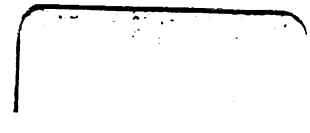

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